# Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1428

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KIRBY J. HENSLEY,

*Petitioner,*

v.

MUNICIPAL COURT, SAN JOSE-MILPITAS JUDICIAL DISTRICT, SANTA CLARA COUNTY,

*Respondent.*

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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## INDEX

**Docket Entries**

UNITED STATES DISTRICT COURT

C-70 1276 OJC RFP

KIRBY J. HENSLEY,

vs.

MUNICIPAL COURT, SAN JOSE-MILPITAS JUDICIAL DISTRICT SANTA CLARA COUNTY, PEOPLE OF THE STATE OF CALIFORNIA.

*For Plaintiff:*

PETER R. STROMER
515 North First Street, Suite 201
San Jose, California 95112

*For Defendant:*

LOUIS P. BERGNA, District Attorney
190 W. Hedding Street
San Jose, California 95110

*Basis of Action:*

Petition for Writ of Habeas Corpus

| DATE | PROCEEDINGS |
|---|---|
| 1970 | |
| 6-16 | 1. Filed Petition for Writ of Habeas Corpus |
| 12 | 2. Filed Appli. by Petnr. for Stay of Execution in Connection with Petn. for Hab. Corp. |

*Docket Entries*

| DATE | PROCEEDINGS |
|---|---|
| 1970 | |
| 12 | 3. Filed O.S.C. returnable June 26, 1970 at 10 A.M. in San Jose; Resp. to File A Return by June 22, 1970; Petnr. May File a Traverse Prior to June 26, 1970. |
| 18 | 4. Filed motion by petnr. to Transfer to San Jose and Assigned to Judge Peckham & to Con. Hrg. to July 24 ,1970, 10 A.M. |
| 23 | 5. Filed Order Cont. to San Jose, Calif. for Hrg. before Judge Peckham on July 24, 1970, 10 A.M. |
| 25 | 6. Filed Reassignment Order of Case to Judge Peckham |
| 7– 6 | 7. Filed Petnr's Memo of Pts. & Auths. |
| 24 | 8. Filed Resps Ret to OSC, Pts & Auths in Oppos. to Petn for Writ of HC. |
| 24 | Ord aft hrg. Mo for Convening Three Judge Court not Given; Appli for OSC Submitted |
| 29 | 9. Filed Petnr's Traverse & Affidavit of Trial Counsel, Robert C. Bienvenu |
| 31 | 10. Filed Order Denying Petn. for Writ of Hab. Corp. Copies mailed. |
| 8– 4 | 11. Filed petnr's memo of pts & auths. |
| 4 | 12. Filed Order granting Certificate of probable cause to appeal |
| 5 | (Copies mailed to Parties of Record) |

*Docket Entries*

| DATE | | PROCEEDINGS |
|---|---|---|
| 6 | 13. | Filed defts proof of svc of memo of pts & auths. |
| 7 | 14. | Filed notice of Appeal by Pltff under provision FRAP Rules 24 & 22-B |
| 10 | 1. | Mailed Clerk's notice of filing appeal |
| 7 | 15. | Filed $250.00 Cost Bond on Appeal by Pltff |
| 13 | 16. | Filed designated for record on appeal by Pltff & No Reporter's Transcript will be required |
| 9–16 | | Made, Hand Carried Record on Appeal CCA |

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO, CALIFORNIA 94102

Name Peter R. Stromer
Number 295-4430
Address 515 North First Street
*Attorney for Petitioner*

**Petition for Writ of Habeas Corpus**
**Persons in State Custody**

No. C-70 1276 OJC

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KIRBY J. HENSLEY,

vs.

MUNICIPAL COURT, SAN JOSE-MILPITAS JUDICIAL DISTRICT SANTA CLARA COUNTY, PEOPLE OF THE STATE OF CALIFORNIA.

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[File Endorsement and Instructions Omitted]

1. Place of detention: released under own recognizance.

2. Name and location of court which imposed sentence: Municipal Court for the San-Jose Milpitas Judicial District, 200 West Hedding, San Jose, California.

3. The indictment number upon which and the offense for which sentence was imposed: No. 10511-C. Violation of California Education Code § 29007.

4. The date upon which sentence was imposed and the terms of the sentence: July 1, 1969 sentenced to one year in jail and fined $625.00.

5. A finding of guilty was made after a plea of not guilty.

6. That finding was made by a judge without a jury.

7. Did you appeal from the judgment of conviction or the imposition of sentence? Yes.

*Petition for writ of Habeas Corpus*
*Persons in state Custody*

8. If you answered "yes" to (7), list

(a) The name of each court to which you appealed: Appellate Department, Superior Court of the State of California in and for the County of Santa Clara (Appeal plus petition for rehearing and/or certification).

(b) The result in each such court to which you appealed: Affirmed conviction.

(c) The date of each such result: February 2, 1970. Petition for rehearing and/or certification to District Court of Appeal denied March 5, 1970.

(d) If known, citations of any written opinion or orders entered pursuant to such results: Opinion #222 In the Superior Court of the State of California in and for the County of Santa Clara, Appellate Department.

9. [Not applicable].

10. State concisely the grounds on which you base your allegations that you are being held in custody unlawfully:

(a) Violation of U.S. Constitution, 1st Amendment.

(b) Violation of U.S. Constitution, 14th Amendment.

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

(a) The conviction herein is illegal and violative of petitioner's free exercise of religious belief guaranteed by the U.S. Constitution, Amendment I. Petitioner is the chief presiding officer and direc-

tor of a bona fide church and religious denomination. He has been convicted for exercising his religious beliefs whereby, in furtherance of its exclusively religious activities, his Church has awarded honorary Doctor of Divinity certificates to individuals who complete a course of instruction in the Church's principles.

The United States Supreme Court as long ago as 1872 decreed that controversies over church doctrine and practice were beyond the scope and jurisdiction of civil authorities.

> "In this country the full and free rights to entertain any religious belief, to practice any religious principle, and to teach any religious doctrine which does not violate the laws of morality and property, and which does not infringe personal rights is conceded to all. The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect." *Watson* v. *Jones*, 13 Wall. 679, at 728-729 (1872), quoted with approval in Presbyterian Church v. Hull Church, 393 U.S. 440 (1969).

(b) Failure of trial counsel to appear and present any defense of fact or law that was available to petitioner when the Trial Court re-opened the case prevented petitioner from obtaining evidence necessary to his defense. It is respectfully submitted that such inadvertence by counsel effectively denied petitioner a trial on the merits and constitutes a denial of due process *contra* petitioner's

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Constitutional rights under the 14th Amendment to the U.S. Constitution.

12. Prior to this petition have you filed with respect to this conviction.

(a) Any petition in a State court for relief from this conviction? Yes.

(b) Any petitions in State courts for habeas corpus? Yes.

(c) Any petitions in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? No.

(d) Any other petitions, motions or applications in this or any other court? No.

13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:

(a) the specific nature thereof: Petition for rehearing and/or certification to California District Court of Appeals.

(b) the name and location of the court in which each was filed: Superior Court Appellate Department, 190 North Market Street, San Jose, California.

(c) the disposition thereof: Petition denied without opinion. State Habeas Corpus petitions denied without opinion by District Court of Appeal & California Supreme Court.

(d) the date of each such disposition: March 5, 1970 —Petition for rehearing denied. March 20, 1970— Habeas Corpus denied by Court of Appeal.

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June 10, 1970—Habeas Corpus denied by Supreme Court.

(e) if know, citations of any written opinions or orders entered pursuant to each such disposition: NONE.

14. Has any ground set forth in (10) been previously presented to this or any other court, state or federal, in any petition, motion or application, which you have filed? Yes.

15. If you answer "yes" to (14), identify.

(a) which grounds have been previously presented: ALL.

(b) The proceeding in which each ground was raised: In petition for rehearing and in State Habeas Corpus petitions.

16. [Not applicable]

17. Were you represented by an attorney at any time during the course of—

(a) your arraignment and plea? Yes.

(b) your trial, if any? Yes.

(c) your sentencing? Yes.

(d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Yes.

(e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? Yes.

*Petition for writ of Habeas Corpus*
*Persons in state Custody*

18. If you answered "yes" to one or more parts of (17), list—

(a) the name and address of each attorney who represented you:

I. Robert C. Bienvenu, Modesto, California.

II. Richard T. Tosaw, 928 12th St., Modesto, Cal.

III. Peter R. Stromer, 515 North First Street, Suite 201, San Jose, California 95112

(b) the proceedings at which each such attorney represented you:

I. Trial.

II. Appeal.

III. Petition for rehearing & State Habeas Corpus Petitions.

19. [Not applicable]

STATE OF CALIFORNIA,
COUNTY OF SANTA CLARA, *ss.*:

PETER R. STROMER, being first sworn under oath, presents that he has subscribed to the foregoing petition and does state that the information therein is true and correct to the best of his knowledge and belief.

/s/ Peter R. Stromer
Signature of Affiant
Attorney for Petitioner

[Jurat Omitted]

## Return to Order to Show Cause and Points and Authorities in Opposition to Petition for Writ of Habeas Corpus

[File Endorsement and Caption Omitted]

Comes now LOUIS P. BERGNA, District Attorney of Santa Clara County and his deputy, DENNIS ALAN LEMPERT for the People of the State of California and for a return to the Order to Show Cause heretofore issued in the above-entitled matter on June 12, 1970.

I.

On February 14, 1969, a complaint was filed in the Municipal Court for the San Jose-Milpitas Judicial District, accusing the defendant, KIRBY J. HENSLEY, Petitioner, of a misdemeanor, to wit, a violation of California Education Code Section 29007.

II.

Trial was had in the aforementioned court before his Honor, Judge EDWARD J. NELSON, on May 19, 1969.

At the time of trial, the defendant and his attorney then being present, witnesses were called by the People and evidence was submitted.

At the close of the People's case, after the People had rested, the defendant moved for a dismissal. Extensive argument was had regarding the court's jurisdiction in the case, and the judge ruled that the court lacked jurisdiction to hear the case and stayed further proceedings.

The following day, the People filed a Notice of Motion to re-open the case for further argument regarding jurisdiction. The defendant filed a Notice in Opposition to that motion.

*Return to Order to Show Cause and Points and Authorities in Opposition to Petition for Writ of Habeas Corpus*

On May 27, 1969, the court set aside the stay and placed the matter back on calendar for June 11 to consider the People's motion. The defendant was not present at that time although he had been notified and was aware of the proceeding.

On June 11, the defendant again absented himself from the proceedings when the court determined that it did in fact have jurisdiction pursuant to Penal Code Section 781.

III.

On June 25, the time the court had set for further trial in this matter, the defendant not being present, the judge found the defendant guilty and set the date of sentencing for June 27, 1969.

IV.

On June 27, 1969, the court continued sentencing until July 1, 1969, at the request of the defendant.

The defendant, with his counsel, appeared on July 1, 1969, and sentence was imposed by the court.

Execution of this sentence was stayed at the request of the defendant pending his appeal.

V.

Notice of Appeal to the Appellate Division of the Superior Court was filed by the defendant on July 3, 1969.

On February 2, 1970, the Appellate Division of the Superior Court of Santa Clara County filed a written opinion, No. 222, which affirmed in all respects, the Petitioner's conviction. Petition for re-hearing and or certification to the District Court of Appeal was denied by the Appellate Division on March 5, 1970.

*Return to Order to Show Cause and Points and Authorities in Opposition to Petition for Writ of Habeas Corpus*

VI.

The Court of Appeals of the State of California in 1 Crim. 1687 denied the Habeas Corpus Petition of the Petitioner on March 20, 1970.

The California Supreme Court in Crim. 14608 similarly denied Petitioner's Habeas Corpus Petition on June 10, 1970.

VII.

Each of the courts above mentioned were presented with basically the same allegations by the Petitioner and each of the Courts found that there had been no violation of either state or federal constitutional rights. In fact, there has not been a violation of any constitutional rights possessed by this Petitioner and the judgment is valid in all respects.

VIII.

This Petitioner is not presently in custody. He is at liberty on his own recognizance pending the outcome of this habeas corpus proceeding. Therefore, this court is not in a position, at this time, to hear, consider, or grant a Writ of Habeas Corpus.

POINTS AND AUTHORITIES

Title 28, U.S.C. Section 2241(c)(3), provides as follows:

"(c) The Writ of habeas corpus shall not extend to a prisoner unless—

"(3) He is in custody in violation of the Constitution or laws or treaties of the United States".

*Return to Order to Show Cause and Points and Authorities in Opposition to Petition for Writ of Habeas Corpus*

In the many cases that have construed the above section with particular emphasis on the word "custody" there has been uniformity in holding that unless the individual is in physical custody, the Writ of Habeas Corpus is not available to him. Additionally, where an individual has been released either on bail or on his own recognizance, the status of that individual is not one of "in custody" to come within the purview of the Federal Habeas Corpus. *Moss* v. *State of Maryland*, 272 F. Supp. 371 (1967).

Historically, the Great Writ or Writ of Habeas Corpus is available to free an individual who is illegally incarcerated. However, as stated in *Brown* v. *Johnston*, 306 U.S. 19, 26 (1939), there is no higher duty than to maintain [the Writ of Habeas Corpus] unimpaired. Here, where the Petitioner's liberty has not been infringed upon, this great constitutional relief, should not be invoked unnecessarily lest it be vitiated by its over broad use.

IX.

The Petitioner intentionally and deliberately bypassed an available state remedy. Therefore, Respondent feels in view of the fundamental nature of the defect, the petition should be summarily denied.

POINTS AND AUTHORITIES

Section 1043 of the California Penal Code provides in part that if a defendant in a misdemeanor action absents himself with full knowledge that a trial is to be or is being had, the trial may proceed in his absence. In so absenting himself from the trial and having the full knowledge of its occurrence, the defendant knowingly relinquishes

his right to defendant himself and to present such evidence as might lead to an acquittal.

In the case of *Nelson* v. *People of the State of California*, 346 F.2d 73 (1965), decided by the Ninth Circuit Court of Appeals, the court stated, "If a habeas applicant, after consultation with competent counsel or otherwise, understandably and knowingly forwent the privilege of seeking to vindicate his federal claims in the state courts whether, for strategic, tactical, or any other reason that can fairly be described as a deliberate bypass of state procedures, than it is open to the federal court on habeas to deny him all relief if the state courts refuse to entertain his federal claims on the merits—though of course, only after the federal court has satisfied itself, by holding a hearing or by some other means, of the facts bearing on the applicant's defaults." The courts went on to say, "If either reason motivated the action of Petitioner's counsel, and their plans backfired, counsel's *deliberate choice* (emphasis added) of the strategy would amount to a waiver binding on Petitioner and would preclude him from a decision on the merits of his federal claim either in the state court or here."

Traveling slightly further back in time, we find in the case of *Fay* v. *Noia*, 372 U.S. 391, "We therefore hold that the federal habeas judge may in his discretion deny relief to an applicant who had deliberately bypassed the orderly procedure of the state courts and so doing has forfeited his state court remedies."

"But we wish to make very clear that this grant of discretion is not to be interpreted as a permission to introduce legal fictions into federal habeas corpus. The classic definition of waiver enunciated in *Johnson* v. *Zerbst*, 304

U.S. 458, 464, 'An intentional relinquishment or abandonment of a known right or privilege'—furnishes the controlling standard." The attached affidavit by the undersigned clearly demonstrates that the decision made by Petitioner's counsel was a deliberate decision to remain absent from the proceedings, and by pass the right to defend oneself.

Here, it is clear that the benefit of the Writ of Habeas Corpus should not be available to the Petitioner who, but for his conscious choice, would have had other remedies available to him.

X.

With regard to the allegations contained in the petition regarding the status of the Petitioner, the so-called religious organization which he heads, and the nature and effect of the "Honorary Doctor of Divinity" Degree issued, the record before this court is barren of any scentilla of proof to substantiate the claimed 'facts' as set forth.

The Petitioner failed to present these "facts" in the appropriate judicial tribunal to wit, Judge Nelson's court and should not now be permitted to bring before the court without benefit of cross examination or otherwise items which were not heretofore sought to be proved.

CONCLUSION

The state courts refused to entertain the Petitioner's assertions of the deprivation of his constitutional rights in view of his intentional and deliberate absence from the trial.

*Return to Order to Show Cause and Points and Authorities in Opposition to Petition for Writ of Habeas Corpus*

WHEREFORE, we respectfully submit that the Order to Show Cause be discharged, habeas corpus be denied and the proceedings be dismissed.

DATED: July 24, 1970, in San Jose, California

LOUIS P. BERGNA, *District Attorney*
Santa Clara County
By /s/ DENNIS ALAN LEMPERT
Dennis Alan Lempert
*Deputy District Attorney*

*Attorneys for the People*

## Affidavit of Dennis Alan Lempert

[Caption Omitted]

I, DENNIS ALAN LEMPERT, Deputy District Attorney, 190 West Hedding Street, San Jose, California declare:

That I was the Deputy District Attorney responsible for the trial of KIRBY J. HENSLEY.

That after proceedings were stayed on May 19, 1969, I personally contacted the defendant's attorney, Robert C. Bienvenu in Modesto. I advised Mr. Bienvenu of the proceedings pending in Judge Nelson's court and was advised by Mr. Bienvenu that under no circumstances would he or his client, KIRBY J. HENSLEY, return to this jurisdiction for any further proceedings.

I declare on information and belief and under penalty of perjury that the foregoing is true and correct.

DATED: July 24, 1970, at San Jose, California.

/s/ DENNIS ALAN LEMPERT
Deputy District Attorney
Dennis Alan Lempert

## Affidavit of Dennis A. Lempert

[Caption Omitted]

I, DENNIS ALAN LEMPERT, Deputy District Attorney, 190 West Hedding Street, San Jose, California declare:

That between the period of June 14, 1970 through July 10, 1970, I was attending National District Attorney's College at Houston, Texas.

That upon my return to the office, I was unaware until July 15, 1970 of the pendency of the Petition for Writ of Habeas Corpus.

That I have attempted to the greatest extent possible to complete the Return to Order To Show Cause. However, I was unable to complete said document until 9:00 a.m. this date.

That on Wednesday, July 22, 1970, I contacted attorney for the petitioner and advised him of my circumstances and requested a stipulated continuance. Mr. Stromer declined to agree to a continuance and I at that time indicated to him the general nature of the legal basis in the Return to Order To Show Cause.

That I therefore respectfully request the Court in its discretion to permit the filing of the Return to Order To Show Cause at this time in view of the unusual circumstances causing its delay.

I declare on information and belief and under penalty of perjury that the foregoing is true and correct.

Dated: July 24, 1970, at San Jose, California.

/s/ DENNIS ALAN LEMPERT
Dennis Alan Lempert
Deputy District Attorney

## Traverse by Petitioner and Affidavit of Trial Counsel, Robert C. Bienvenu

[File Endorsement and Caption Omitted]

Petitioner for his traverse of the return to the writ of habeas corpus, alleges:

I.

Answering the allegations of paragraphs I and II thereof petitioner admits all the material allegations thereof except that allegation wherein it is stated that defendant had been notified and was aware of the proceedings either on May 27, 1969 or June 11, 1969, which allegation is expressly denied.

II.

Answering the allegations of paragraphs III, IV, V and VI thereof, petitioner admits the allegations therein.

III.

Answering the allegations of paragraph VII thereof, petitioner admits the allegations therein, except that petitioner denies that there has not been a violation of his constitutional rights and further denies that judgment is valid in all respects.

IV.

Answering the allegations of paragraph VIII thereof, petitioner admits that he is released on his own recognizance per a Stay of Execution granted by the Honorable Edward J. Nelson, Judge, Municipal Court, San Jose-Milpitas Judicial District pending the outcome of this habeas corpus proceeding. Except as herein admitted, peti-

*Traverse by Petition and Affidavit of Trial Counsel, Robert C. Bienvenu*

tioner denies that he is not presently in custody, being in constructive custody of the trial court, respondent herein, and further denies that this court is not in a position, at this time, to hear, consider, or grant a Writ of Habeas Corpus.

V.

Petitioner reiterates all of the facts stated in the petition and pleadings filed herein on his behalf as reasons why such detention is without warrant of law.

WHEREFORE, KIRBY J. HENSLEY, the petitioner herein prays that the said Writ of Habeas Corpus be sustained and that he be delivered from the custody and restraint of said respondent as prayed for in the petition for said Writ and for his discharge from the custody, restraint and detention of his liberty as hereinabove set forth and for such other, further and different relief as to the Court may seem just and proper.

/s/ PETER R. STROMER
Peter R. Stromer
Attorney for Petitioner

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I, the undersigned, say:

I am the attorney for the Petitioner in this action; Petitioner is absent from the County of Santa Clara, California, where I have my office, and I make this verification for and on behalf of that party for that reason; I have read the above document and know its contents; I am

*Traverse by Petition and Affidavit of Trial Counsel, Robert C. Bienvenu*

informed and believe and, on that ground, allege that the matters stated in it are true.

Executed on July 27, 1970, at San Jose, California.

I declare under penalty of perjury that the above is true and correct.

/s/ PETER R. STROMER
Peter R. Stromer

## Declaration of Robert C. Bienvenu

ROBERT C. BIENVENU says:

That I am an attorney at law, duly licensed to practice in the State of California. That I was the attorney of record for defendant, Kirby J. Hensley, at the trial held in the Municipal Court for the San Jose-Milpitas Judicial District on May 19, 1969.

That upon the completion of the prosecution's case, a motion for acquittal was made pursuant to Section 1118 of the Penal Code of the State of California. That, after argument by both sides, the Court ended the trial, bail was exonerated and defendant and all his witnesses left the courtroom without presenting a defense.

Subsequently, a telephone call was received from Deputy District Attorney Lempart stating that he was making a motion to reopen the case.

No authority was cited to declarant permitting the reopening of a criminal proceedings upon the completion of the prosecution's case after jeopary had attached. Declarant indicated that he would not and, in fact, did not, appear at the time of the motion but filed a written Memorandum in Opposition to the Notice of Motion.

The Court granted the motion, found defendant guilty and pronounced sentence on July 1, 1969. A Notice of Appeal was filed on July 2, 1969. On July 5, 1969, declarant's wife passed away and a substitution of attorneys was made and since that time, declarant has not been associated with the case.

Declarant at no time deliberately bypassed any established state procedures in the case. Though declarant did not appear personally at the time of the hearing on the motion to reopen, a complete memorandum in opposition

thereto was timely filed. The memorandum before the Court contained everything declarant would have said in oral argument. Nothing further could have been added, and to travel to San Jose from Modesto to reiterate the contents would have taken a full day from declarant's practice and wasted the Court's time. It is a common practice to submit motions for the Court's decision based upon a written memorandum when the attorneys involved practice in another city a long distance from the courthouse where the matter is to be heard.

The defendant was convicted in absentia on the misdemeanor charge but this too is in accord with established state procedure.

A timely motion of appeal was filed in the case and handled by another attorney. Therefore, from the beginning of the case to the present time, every act performed by declarant was in complete accord with established state procedures.

I declare under penalty of perjury, that the foregoing is true and correct.

Executed on July 27, 1970, at Modesto, California.

/s/ Robert C. Bienvenu
Robert C. Bienvenu

## Points and Authorities

[Caption Omitted]

### I

The Nelson case, *Nelson* v. *People of the State of California*, 346 F.2d 73 is clearly distinguishable from the case at bar. In *Nelson*, the District Court, in its dismissal of Nelson's habeas corpus proceeding, never did reach the merits of Nelson's contention as to his constitutional rights for as the Court pointed out that Nelson's claim to suppress evidence illegally obtained must first be raised *at trial* by appropriate objection and not raised for the first time on appeal. (emphasis supplied) (citations) Petitioner herein has not had a trial on the merits to this date. Absent such a trial, petitioner has not yet had an opportunity to present any defense to the charges made leading to this conviction.

Further, the District Court, in *Nelson*, concluded that Nelson had been competently represented by his counsel, that Nelson at no time contended that in handling the matter as he did, his counsel was acting contrary to Nelson's wishes.

Petitioner herein emphatically denies that his trial counsel advised him that the trial was to be reopened in San Jose and failure of petitioner to appear would lead to his conviction. As stated in the pleadings on file herein, petitioner was advised *contra*, that the trial in San Jose was dismissed and that petitioner need not appear further. There was no deliberate by-passing of state procedure. As the Ninth Circuit Court of Appeals makes clear in Nelson, *supra*, there must be "strategic, tactical, or any other reasons than can *fairly* be described as the deliberate by-passing of state procedure, . . ." *Id*, at 79. "At all

events we wish it clearly understood that the standard here put forth depends on the *considered choice of the petitioner. A choice made by counsel not participated in by the petitioner does not automatically bar relief." Id.,* (emphasis supplied.)

II

Just as the facts herein show no deliberate by-pass of state procedures there is no evidence to show a waiver of a federally guaranteed constitutional right. The rules that govern the determination of whether a constitutional right has been waived are summarized in *Brookhart* v. *Janis,* 384 U.S. 1, 86 S.Ct. 1245, 16 L.Ed.2d 314 (1966):

> "The question of a waiver of a federally guaranteed constitutional right is, of course, a federal question controlled by federal law."

There is a presumption against the waiver of constitutional rights, see, e.g., *Glasser* v. *United States,* 315 U.S. 60, 70-71, and for a waiver to be effective it must be clearly established that there was "an intentional relinquishment or abandonment of a known right or privilege." *Johnson* v. *Zerbst,* 304 U.S. 485, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461.

III

In *Kuhl* v. *United States,* (9th Cir.) 370 F.2d 20 (1966), a 5-4 decision, the majority opinion denied a motion to vacate judgment on grounds of deliberate by-passing of state criminal procedures by stating:

> "It is urged in the dissent that we should order a hearing on these questions. We think that to do so here, *in a case in which a defendant had a fair trial and*

*was represented by competent counsel,* would be to reach out to find support for a collateral attack on his conviction . . ." *Id,* at 23. (emphasis supplied)

Herein, the facts are clearly distinguishable. There has been no fair trial, if any trial at all, due to inadvertence of trial counsel.

IV

Pursuant to 28 U.S.C. §2254(d)(6) petitioner has not had a full, fair, and adequate hearing in the state court proceeding. Not only were material facts not adequately developed in the state hearing, no facts were developed in petitioner's defense. There is thus sufficient evidence to support a finding that petitioner was denied effective assistance of counsel. If counsel are sufficiently deficient in their performance, defendant may claim that his constitutional right to effective representation has been lost; further even the fact that defendant has had a fair trial of that issue in the state court and lost does not mean that he cannot raise it again in federal court, since it is a federal right. 28 U.S.C.A. §§2254, 2254(d)(3, 6) *Leventhal* v. *Gavin,* 421 F.2d 270 (1970).

V

The U.S. Supreme Court's decision in *Townsend* v. *Sain,* 1963, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770, requires that a federal court grant an evidentiary hearing to a habeas corpus applicant if . . . the state factual determination is not fairly supported by the record as a whole. *Id.,* at 313, 83 S.Ct. at 757.

VI

In order to sustain a claim of ineffective counsel there must be an affirmative factual basis demonstrating coun-

sel's inadequacy of representation. In re Parker, 423 F.2d 1021 (1970). It is respectfully submitted that the record herein conclusively shows that trial counsel's failure to appear when advised by the District Attorney that the case was being re-opened constitutes a sufficient factual basis demonstrating counsel's inadequacy of representation.

VII

By the express terms of §2254(d) the presumption of correctness of state court findings does not arise if the applicant establishes, among other things, that the state court hearing was not *"full, fair, and adequate"* or that *"the material facts were not adequately developed* in the State Court hearing" *Selz* v. *State of California,* (9th Cir.) 423 F.2d 702 (1970).

Clearly, the factual record herein is devoid of any showing that a fair trial was had on the merits. What the State is contending is that petitioner herein must be allowed to serve a year in jail because his trial counsel's inadvertence or incompetence in failing to appear and in failing to advise his client, petitioner herein, that such failure to appear by trial counsel and defendant therein would result in his conviction, must be construed as a "deliberate by-passing" of state remedies. It is respectfully submitted that such a contention must shock the conscience of this court. A review of the cases wherein the "deliberate by-passing" doctrine has been formulated, (*Nelson, Kuhl, Selz, supra*) shows that in every case the court made an independent finding that there was adequate representation by competent counsel before the "deliberate by-pass" rule was applied. As the U.S. Supreme Court stated in *Fay* v. *Noia,* 372 U.S. 391, 83 S.Ct. 822, "(A)p-

plication of the "deliberate by-pass" doctrine requires the resolution of factual issues." *Id.*

Dated: July 27, 1970

/s/ PETER R. STROMER
Peter R. Stromer
*Attorney for Petitioner*

## Order

[File Endorsement and Caption Omitted]

Petitioner, convicted of a misdemeanor in the state court and presently out on O.R. (own recognizance), brings an action in habeas corpus challenging the constitutionality of the state conviction.

The petition must be denied, because this court does not have jurisdiction over the matter. 28 U.S.C. § 2241(c)(3) provides that the writ of habeas corpus shall not extend to a prisoner unless he is "in custody" in violation of the laws of the United States.

The law of this circuit is clear that one who is out on bail is not "in custody" for either habeas corpus or 28 U.S.C. § 2255 purposes. *Matysek* v. *U.S.*, 339 F.2d 389, 392-93 (9th Cir. 1964). A fortiori, a person out on O.R. would not be in custody either.

The petition for habeas corpus is denied.

IT IS SO ORDERED.

Dated: 7/31/70

/s/ ROBERT F. PECKHAM
*United States District Judge*

## Order

[File Endorsement and Caption Omitted]

Petitioner's motion for reconsideration of his habeas corpus petition is denied.

However, petitioner is granted a certificate of probable cause so that he may test this court's reliance on *Matysek* v. *United States*, 339 F.2d 389, 392-93 (9th Cir. 1964) in the Court of Appeals for the Ninth Circuit.

Certificate of probable cause granted.

IT IS SO ORDERED.

August 4, 1970.

/s/ ROBERT F. PECKHAM
United States District Judge

## Notice of Appeal

[File Endorsement and Caption Omitted]

Notice is hereby given that KIRBY J. HENSLEY, petitioner above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit, from the order and judgment rendered, made and entered herein on July 31, 1970, denying the petition for a writ of habeas corpus herein on the ground that this Court lacked jurisdiction over the matter.

DATED: August 5, 1970

/s/ PETER R. STROMER
Attorney for Petitioner

**Opinion of United States Court of Appeals For the Ninth Circuit**

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 26274

---

KIRBY H. HENSLEY,

*Appellant,*

vs.

MUNICIPAL COURT, SAN JOSE-MILPITAS JUDICIAL DISTRICT SANTA CLARA COUNTY, STATE OF CALIFORNIA,

*Appellee.*

---

[January 19, 1972]

Appeal from the United States District Court for the Northern District of California

Before:

KOELSCH and CARTER, *Circuit Judges*, and SMITH,* *District Judge.*

PER CURIAM:

The sole question on appeal is whether or not a person released on his own recognizance following trial, convic-

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*Honorable Russell E. Smith, United States District Judge, Missoula, Montana, sitting by designation.

tion and sentence on a state criminal charge is within the purview of 28 U.S.C. §2241, which extends the remedy of habeas corpus to persons "in custody" in violation of the federal constitution.[1] We conclude that he is not.[2]

Not long ago, this court squarely ruled on this question in *Matysek* v. *United States*, 339 F.2d 389 (1964), cert. denied 381 U.S. 917. We held that a person released on bail was not "in custody," actual or constructive, so as to satisfy 28 U.S.C. §2241.[3]

Appellant Hensley urges that *Matysek* has been implicitly overruled by the recent Supreme Court cases of *Walker* v. *Wainwright*, 390 U.S. 335 (1968); *Peyton* v. *Rowe*, 391 U.S. 54 (1968) and *Carafas* v. *LaVallee*, 391 U.S. 234 (1968). These cases are distinguishable because in each of them there existed actual or constructive custody. In *Walker* and *Rowe*, the petitioners were in actual custody and in *Carafas*, the petitioner was on parole. In *Matysek*, this court, while recognizing that release on parole constituted constructive custody, distinguished a

---

[1] Hensley has been at liberty on recognizance at all times since conviction. Initially the state court stayed execution of sentence. At the exhaustion of Hensley's state remedies the district court issued a stay of execuiton pending habeas proceedings therein. Both the district court and this court denied a stay of execution pending this appeal. Subsequently, the Circuit Justice granted the stay.

[2] We are unable to treat this petition as one seeking coram nobis relief because Hensley seeks to challenge a state court proceeding in federal court. Coram nobis lies only to challenge errors occurring in the same court. 7 Moore's Federal Practice 60.14, p. ¶46.

[3] The decisional rule is different in several other circuits. Capler v. Greenville, 422 F.2d 299 (5th Cir. 1970); Burris v. Ryan, 397 F.2d 553 (7th Cir. 1968); Ouletta v. Sarver, 428 F.2d 804 (8th Cir. 1970).

bail situation holding that the attendant restrictions did not constitute custody. The Supreme Court has not, to this date, considered the express question posed herein.

We feel, therefore, constrained to follow *Matysek* v. *United States, supra.*

Affirmed.

## Order Denying Petition for Rehearing and Rejecting Suggestion for Rehearing *In Banc*

[File Endorsement and Caption Omitted]

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing in banc.

The full court has been advised of the suggestion for an in banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing in banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied, and the suggestion for a rehearing in banc is rejected.

Feb. 18, 1972

M. Oliver Koelsch
United States CircuitJudge

**Order Granting Petition for Writ of Certiorari**

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 71-1428

---

KIRBY H. HENSLEY,

*Petitioner,*

v.

MUNICIPAL COURT, SAN JOSE-MILPITAS JUDICIAL DISTRICT, SANTA CLARA COUNTY,

*Respondent.*

---

The petition for a writ of certiorari is granted.

October 10, 1972

71-1428



IN THE

# Supreme Court of the United States

OCTOBER TERM, 1971

No. .....



KIRBY J. HENSLEY,

*Petitioner,*

vs.

MUNICIPAL COURT, SAN JOSE-MILPITAS JUDICIAL DISTRICT, SANTA CLARA COUNTY, STATE OF CALIFORNIA,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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KIRBY J. HENSLEY,

*Petitioner,*

vs.

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*Respondent.*

---

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit, which affirmed the denial of a petition for a writ of habeas corpus by the United States District Court for the Northern District of California.

### Opinions Below

The decision of the United States District Court for the Northern District of California denying petition for writ of habeas corpus is unreported, and is set out in Appendix "A." The District Court's order denying reconsideration, but granting a certificate of probable cause is unreported and is set forth in Appendix "B."

The decision of the United States Court of Appeals for the Ninth Circuit is officially reported at 453 F.2d 1252,

and is set out in Appendix "C." The order of the Court of Appeals denying petition for rehearing and rejecting suggestion for rehearing in banc is set forth in Appendix "D."

## Jurisdiction

The judgment of affirmance of the Court of Appeals was entered on January 19, 1972. A timely filed petition for rehearing in banc was denied on February 18, 1972. By order dated March 20, 1972, Mr. Justice Douglas extended the time for filing a petition for writ of certiorari to and including May 1, 1972.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The District Court had jurisdiction under 28 U.S.C. §2241(c)(3).

## Question Presented for Review

Whether or not a person released on his own recognizance following trial, conviction and sentence on a state criminal charge is within the purview of 28 U.S.C. §2241 (c)(3), which extends the remedy of habeas corpus to persons "in custody" in violation of the Constitution of the United States.

## Constitutional and Statutory Provisions Involved

Article I, Section 9, of the Constitution of the United States provides, in pertinent part:

"The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."

28 U.S.C. §2241:

"Power to grant writ:

* * *

(c) The writ of habeas corpus shall not extend to a prisoner unless—

* * *

(3) He is in custody in violation of the Constitution . . . of the United States;"

28 U.S.C. §2254:

"State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution . . . of the United States."

## Statement

Petitioner, KIRBY J. HENSLEY, convicted of a misdemeanor in the state court,[1] and presently enlarged on his own recognizance,[2] filed a petition for writ of habeas corpus in the United States District Court for the Northern Dis-

---

[1] Hensley was sentenced to one year in jail plus $625 fine and penalty assessment for violation of California Education Code §29007, which prohibits the award of Doctor of Divinity degrees without requisite accreditation.

[2] Hensley has been enlarged on recognizance at all times since his conviction. Initially, the state court stayed execution of sentence. At the exhaustion of Hensley's state remedies, the district court issued a stay of execution pending habeas proceedings therein. After the petition was denied, the Circuit Justice granted a stay pending appeal to the Court of Appeals. Following the affirmance of the denial of habeas corpus, the Court of Appeals granted a 30 day stay of its mandate pending application for certiorari. This stay was subsequently extended by the Circuit Justice pending the timely filing of a petition for a writ of certiorari.

trict of California, challenging the constitutionality of the state conviction.[1]

The District Court did not reach any substantive issues, but denied the petition on the ground that petitioner, being enlarged on his own recognizance, was not "in custody" for purposes of 28 U.S.C. §2241(c)(3).

The Court of Appeals affirmed, relying upon its previous dictum, in *Matysek v. United States*, 339 F.2d 389 (9th Cir. 1964), to the effect that a person released on bail was not "in custody", actual or constructive, so as to satisfy 28 U.S.C. §2241. The Court of Appeals specifically noted, however, that "the decisional rule is different in several other circuits" and that "the Supreme Court has not, to this date, considered the express question posed herein."

It is to review that ruling that the present petition for certiorari is filed.

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[1] The grounds for this Constitutional challenge are, briefly, as follows: 1) denial of free exercise of religion, by the imposition of punishment for essentially religious activity in awarding honorary Doctor of Divinity certificates to individuals who complete a course of religious instruction, and 2) denial of due process of law and effective assistance of counsel, by the failure of trial counsel to appear and present any defense of fact or law that was available to petitioner when the trial court re-opened the case after having initially stayed the proceedings to determine if it had jurisdiction, and by the imposition of judgment of conviction *in absentia*.

## REASONS FOR GRANTING THE WRIT AND ARGUMENT AMPLIFYING SAME

### The Decision Below Admittedly Conflicts With Decisions of Other Courts of Appeals Which Hold That State Prisoners on Bail Are "In Custody" for Federal Habeas Corpus Purposes, and It Arguably Conflicts With Applicable Decisions of This Court.

The Court below candidly acknowledged that its limited construction of the term "in custody," as used in 28 U.S.C. §2241(c)(3), was a minority view. Many of the other circuits have held that state prisoners on bail are "in custody" for federal habeas corpus purposes.[4] Indeed, the Ninth Circuit itself, on other occasions, has apparently followed the majority rule.[5] And, two decades ago, this Court observed, in *Carlson* v. *Landon*, 342 U.S. 524, 547 (1952): "When a prisoner is out on bond he is still under court control, though the bounds of his confinement are enlarged. His bondsmen are his jailers."

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[4] *Marden* v. *Purdy*, 409 F.2d 784, 785 (5th Cir. 1969); *Capler* v. *City of Greenville*, 422 F.2d 299, 301 (5th Cir. 1970); *Beck* v. *Winters*, 407 F.2d 125, 126-27 (8th Cir. 1969); *Ouletta* v. *Sarver*, 307 F. Supp. 1099, 1101 n. 1 (E.D. Ark. 1970), aff'd, 428 F.2d 804 (8th Cir. 1970); *Burris* v. *Ryan*, 397 F.2d 553, 555 (7th Cir. 1968); *United States ex rel. Smith* v. *Di Bella*, 314 F. Supp. 446, 448 (D. Conn. 1970); *Duncombe* v. *New York*, 267 F. Supp. 103, 109 n. 9 (S.D.N.Y. 1967); *Matzner* v. *Davenport*, 288 F. Supp. 636, 638 n. 1 (D.N.J. 1968), aff'd, 410 F.2d 1376 (3rd Cir. 1969). Interestingly, the California Supreme Court has already held that a person released on recognizance is under sufficient constructive custody to permit him to invoke the Writ of Habeas Corpus. See, *In Re Smiley*, 66 Cal.2d 606, 58 Cal. Rptr. 579, 427 P.2d 179 (1967).

[5] *Settler* v. *Yakima Tribal Court*, 419 F.2d 486 (9th Cir. 1969); *Settler* v. *Lameer*, 419 F.2d 1311 (9th Cir. 1969); *Cantillon* v. *Superior Court*, 305 F. Supp. 304, 306-07 (C.D. Cal. 1969), rev'd on other grounds, 442 F.2d 1338 (9th Cir. 1971); *Choung* v. *People of State of California*, 320 F. Supp. 625 (E.D. Cal. 1970).

In addition, recent decisions of this Court and the 1966 amendments to the federal habeas corpus statute, have combined effectively to undermine, if not actually overrule, the 1964 *Matysek* dictum, which the Court below felt "constrained" to follow.

In *Jones* v. *Cunningham*, 371 U.S. 236, 243 (1963), this Court said:

> "[The writ of habeas corpus] is not now and never has been a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose—the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty."

In *Carafas* v. *La Vallee*, 391 U.S. 234, 239 (1968), the Court stated:

> "the statute does not limit the relief that may be granted to discharge of the applicant from physical custody. Its mandate is broad with respect to the relief that may be granted. It provides that '[t]he court shall . . . dispose of the matter as law and justice require.' 28 U.S.C. §2243. The 1966 amendments to the habeas corpus statute seem specifically to contemplate the possibility of relief other than immediate release from physical custody. At one point, the new §2244(b) (1964 ed., Supp. II) speaks 'in terms of 'release from custody or other remedy.'"[4]

As this Court emphasized in *Harris* v. *Nelson*, 394 U.S. 286, 291 (1969):

> "The scope and flexibility of the writ—its capacity to reach all manner of illegal detention—its ability to cut

---

[4] *Carafas* has been applied to authorize federal habeas challenges to convictions already served. *Stotts* v. *Peyton*, 427 F.2d 1296 (6th Cir. 1970); *United States ex rel. Lawrence* v. *Woods*, 432 F.2d 1072 (7th Cir. 1970).

through barriers of form and procedural mazes—have always been emphasized and jealously guarded by courts and lawmakers. The very nature of the writ demands that it be administered with the initiative and flexibility essential to insure that miscarriages of justice within its reach are surfaced and corrected."

*Peyton* v. *Rowe*, 391 U.S. 54 (1968), actually applied the federal habeas corpus remedy to questions of *future* release. There, the Court overruled *McNally* v. *Hill*, 293 U.S. 131 (1934), and said:

> "to the extent that the rule of *McNally* postpones plenary consideration of issues by the district courts, it undermines the character of the writ of habeas corpus as the instrument for resolving fact issues not adequately developed in the original proceedings."
> 391 U.S., at 73

> "Rowe and Thacker may establish that the convictions they challenge were obtained in violation of the Constitution. If they do, each day they are incarcerated under those convictions while their cases are in the courts will be time that they might properly have enjoyed as free men." Ibid., at 64

The limited interpretation of the federal habeas corpus statute by the court below renders the Great Writ a "narrow, formalistic remedy," contrary to the clear implications of this Court's decisions mentioned above. The majority view, on the other hand, realistically observes: "The fact that petitioner was forced to seek a federal stay order to fend off state incarceration is itself a significant restraint 'not shared by the public generally.'" *Choung* v. *People of State of California*, 320 F. Supp. 625, 628 (E.D. Cal. 1970).

Moreover, in civil rights cases, where the validity of a state statute may be drawn in question, the defendant on bond[1] would be forced under the Ninth Circuit rule, to surrender himself into the confines of an often decrepit, overcrowded penal institution, before the federal habeas judge would have the opportunity to pass upon the constitutional challenge.[2] Such an unjust result would be justified by neither common sense nor by a correct reading of 28 U.S.C. §2241(c)(3).[3]

## CONCLUSION

The Ninth Circuit has practically invited this Court to review this case. By virtue of the granting of federal stays, as well as of a certificate of probable cause, the issue posed herein has been preserved. For the foregoing reasons, the petition for certiorari to review the decision of the Ninth Circuit Court of Appeals should be granted,

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[1] Any attempt to distinguish between release on recognisance and release on cash bail would ignore the fact that the imposition of non-financial conditions constitutes a string on one's liberty to come and go as one pleases, and further, would raise serious equal protection problems of discrimination against indigents, whose only means of obtaining such conditional release is by individual recognisance.

[2] Under this Court's decisions in the septet beginning with *Younger* v. *Harris*, 401 U.S. 37 (1971), a civil suit challenging the constitutionality of a state statute, and seeking to enjoin prosecution thereunder, could not be maintained in federal court, absent a showing of "bad faith" enforcement.

[3] The limited construction of the habeas remedy by the court below may also raise a question of unconstitutional suspension of the "Privilege of the Writ of Habeas Corpus," guaranteed by Article I, Section 9 of the Constitution of the United States.

and the judgment should be reversed and remanded for further proceedings.

Respectfully submitted,

April, 1972.

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# APPENDICES

**Order Dated July 1, 1970**

**In the**

**UNITED STATES DISTRICT COURT**

**Northern District of California**

**No. C-70 1276 RPP**

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**Kirby J. Hensley,**

***Petitioner,***

**v.**

**Municipal Court, San Jose-Milpitas Judicial District, Santa Clara County, State of California,**

***Respondents.***

---

Petitioner, convicted of a misdemeanor in the state court and presently out on O.R. (own recognizance), brings an action in habeas corpus challenging the constitutionality of the state conviction.

The petition must be denied, because this court does not have jurisdiction over the matter. 28 U.S.C. §2241(c)(3) provides that the writ of habeas corpus shall not extend to a prisoner unless he is "in custody" in violation of the laws of the United States.

The law of this circuit is clear that one who is out on bail is not "in custody" for either habeas corpus or 28 U.S.C. §2255 purposes. *Matysek* v. *U.S.*, 339 F.2d 389, 392-93 (9th Cir. 1964). A fortiori, a person out on O.R. would not be in custody either.

The petition for habeas corpus is denied.

**It is so ordered.**

Dated: July 31, 1970.

/s/ Robert F. Peckham
*United States District Judge*

**Order Dated August 4, 1970**

**(Caption omitted)**

**Petitioner's motion for reconsideration of his habeas corpus petition is denied.**

**However, petitioner is granted a certificate of probable cause so that he may test this court's reliance on *Matysek* v. *United States*, 339 F.2d 389, 392-93 (9th Cir. 1964) in the Court of Appeals for the Ninth Circuit.**

**Certificate of probable cause granted.**

**IT IS SO ORDERED.**

**August 4, 1970.**

**/s/ ROBERT F. PECKHAM**
***United States District Judge***

## Opinion of United States Court of Appeals for the Ninth Circuit

(Caption omitted)

[January 19, 1972]

Appeal from the United States District Court for the Northern District of California

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Before: Koelsch and Carter, Circuit Judges, and Smith,* District Judge.

Per Curiam:

The sole question on appeal is whether or not a person released on his own recognizance following trial, conviction and sentence on a state criminal charge is within the purview of 28 U.S.C. §2241, which extends the remedy of habeas corpus to persons "in custody" in violation of the federal constitution.[1] We conclude that he is not.[2]

Not long ago, this court squarely ruled on this question in *Matysek* v. *United States*, 339 F.2d 389 (1964), cert. denied 381 U.S. 917. We held that a person released on bail was

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* Honorable Russell E. Smith, United States District Judge, Missoula, Montana, sitting by designation.

[1] Hensley has been at liberty on recognizance at all times since conviction. Initially the state court stayed execution of sentence. At the exhaustion of Hensley's state remedies the district court issued a stay of execution pending habeas proceedings therein. Both the district court and this court denied a stay of execution pending this appeal. Subsequently, the Circuit Justice granted the stay.

[2] We are unable to treat this petition as one seeking coram nobis relief because Hensley seeks to challenge a state court proceeding in federal court. Coram nobis lies only to challenge errors occurring in the same court. 7 Moore's Federal Practice ¶60.14, p. 46.

not "in custody," actual or constructive, so as to satisfy 28 U.S.C. §2241.[1]

Appellant Hensley urges that *Matysek* has been implicitly overruled by the recent Supreme Court cases of *Walker* v. *Wainwright*, 390 U.S. 335 (1968); *Peyton* v. *Rowe*, 391 U.S. 54 (1968) and *Carafas* v. *LaVallee*, 391 U.S. 234 (1968). These cases are distinguishable because in each of them there existed actual or constructive custody. In *Walker* and *Rowe*, the petitioners were in actual custody and in *Carafas*, the petitioner was on parole. In *Matysek*, this court, while recognizing that release on parole constituted constructive custody, distinguished a bail situation holding that the attendant restrictions did not constitute custody. The Supreme Court has not, to this date, considered the express question posed herein.

We feel, therefore, constrained to follow *Matysek* v. *United States, supra.*

Affirmed.

---

[1] The decisional rule is different in several other circuits. Capler v. Greenville, 422 F.2d 299 (5th Cir. 1970); Burris v. Ryan, 397 F.2d 553 (7th Cir. 1968); Ouletta v. Sarver, 428 F.2d 804 (8th Cir. 1970).

## Order Denying Petition for Rehearing and Rejecting Suggestion for Rehearing *In Banc*

(Caption omitted)

Before: KOELSCH and CARTER, Circuit Judges, and *SMITH, District Judge

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing in banc.

The full court has been advised of the suggestion for an in banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing in banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied, and the suggestion for a rehearing in banc is rejected.

M. OLIVER KOELSCH
*United States District Judge*

*Honorable Russell E. Smith, United States District Judge, Missoula, Montana, sitting by designation.

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# In the Supreme Court

OF THE

# United States

OCTOBER TERM, 1971

No.

KIRBY J. HENSLEY, *Petitioner,*

vs.

MUNICIPAL COURT, SAN JOSE-MILPITAS JUDICIAL DISTRICT, SANTA CLARA COUNTY, STATE OF CALIFORNIA,

*Respondent.*

## RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

### OPINIONS BELOW

The decision of the United States District Court for the Northern District of California denying petition for writ of habeas corpus is unreported and is reproduced at Appendix A of Petition for writ of certiorari at 1a. The District Court's order denying reconsideration but granting certificate of probable cause is also unreported. Ibid., Pet. B at 2a.

The decision of the United States Court of Appeals for the Ninth Circuit is officially reported at 453 F.2d 1252, Ibid., Pet. C at 3a. On February 18, 1972, the

Court of Appeals denied a petition for rehearing and rejected the suggestion for rehearing en banc, Ibid., Pet. D at 5a.

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## JURISDICTION

The jurisdiction of this court is invoked under Title 28, United States Code Section 1254(1).

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## QUESTION PRESENTED

Whether or not a person released on his own recognizance following trial, conviction, and imposition of sentence, but before execution of said sentence on a state criminal charge, is within the purview of 28 U.S.C. Section 2241(c)(3), which extends the remedy of habeas corpus to persons "in custody" in violation of the Constitution of the United States.

---

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 9, of the Constitution of the United States provides, in pertinent part:

> "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."

28 U.S.C. Sec. 2241:

> "Power to grant writ:
>
> (c) The writ of habeas corpus shall not extend to a prisoner unless—
>
> * * *

(3) He is in custody in violation of the Constitution . . . of the United States;"

28 U.S.C. Sec. 2254:

"State custody; remedies in Federal Courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution . . . of the United States."

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## STATEMENT OF THE CASE

Petitioner, Kirby J. Hensley, was convicted of a misdemeanor on June 25, 1969. Thereafter on July 1, 1969, Hensley was sentenced to one year in jail plus $625 fine for his violation of Section 29007 of the California Education Code. Since that time, he has been at liberty on his own recognizance.

The District Court did not reach the substantive issues raised in the petition for writ of habeas corpus filed with it, but denied the petition on the basis that the court lacked jurisdiction over the matter citing the controlling decision of *Matysek v. United States,* 339 F.2d 389 (Ninth Circuit 1964); holding that the custody requirement of 28 U.S.C. Sec. 2241(c)(3) is not met by one at liberty on his own recognizance.

The Court of Appeals affirmed, relying on its previous holding in *Matysek v. United States, supra.*

## ARGUMENT

### THE DECISION BELOW WAS IN ACCORD WITH EXISTING LAW REQUIRING STATE PRISONERS TO BE "IN CUSTODY" TO QUALIFY FOR FEDERAL HABEAS CORPUS.

The statutory prerequisites of a state prisoner being "in custody" to qualify for federal habeas corpus pursuant to 28 U.S.C. 2241(c)(3) have been broadened by decisions of various federal courts.

The term "in custody" has been pulled and stretched to cover more and more applicants not previously under the protective umbrella of federal habeas corpus. In that pulling and stretching of "in custody" a single fiber has remained unaltered; namely, that the applicant must be under some form of restraint. The gamut of the forms of restraint that have been considered range from actual detention[1] to parole[2] to the disability of a prior felony conviction.[3]

The breadth of restraints has not been so broad as to include the minor intrusion resulting from a release on one's own recognizance.

The cases cited by the petitioner deal with situations where the applicant was suffering from restraint or disability not suffered by the public at large that would make him eligible for habeas corpus.

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[1] As this court said in *McNally v. Hill*, 293 U.S. 131, 136 (1934), "This court has consistently refused to review upon habeas corpus questions which do not concern the lawfulness of the detention".

[2] *Jones v. Cunningham*, 371 U.S. 236, 243, 1963 [Parole] imposes conditions which significantly confine and restrain his [petitioner's] freedom; this is enough to keep him in the "custody" of the Virginia Parole Board within the meaning of the habeas corpus statute.

[3] *Carafas v. La Vallee*, 391 U.S. 234, 238 (1968).

## CONCLUSION

The purpose of the writ of habeas corpus is to provide a prompt and effective remedy for whatever society deems to be intolerable restraints. *Fay v. Noya*, 372 U.S. 391, 401 (1963).

In the three years since his conviction, the petitioner has moved freely and unrestrained. The extraordinary circumstances requiring the invocation of the writ of habeas corpus do not exist as to this petitioner. Were this court to grant such relief, it would vitiate the statutory requirements provided for federal habeas corpus, and convert the writ of habeas corpus into a writ of error.

The decision of the Court of Appeals should be affirmed by the denial of certiorari.

Dated, San Jose, California,
July 10, 1972.

Respectfully submitted,

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Deputy District Attorney, Santa Clara County,
*Attorneys for Respondent.*

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1428

KIRBY J. HENSLEY,

*Petitioner,*

—vs.—

MUNICIPAL COURT, SAN JOSE-MILPITAS JUDICIAL DISTRICT, SANTA CLARA COUNTY, STATE OF CALIFORNIA,

*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

## BRIEF FOR PETITIONER

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1428

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KIRBY J. HENSLEY,

*Petitioner,*

—VS.—

MUNICIPAL COURT, SAN JOSE-MILPITAS JUDICIAL DISTRICT, SANTA CLARA COUNTY, STATE OF CALIFORNIA,

*Respondent.*

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

## BRIEF FOR PETITIONER

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## BRIEF FOR PETITIONER

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### Opinions Below

The decision of the United States District Court for the Northern District of California denying petition for writ of habeas corpus is unreported, and is set out at App. 29a. The District Court's order denying reconsideration, but granting a certificate of probable cause is unreported and is set forth at App. 30a.

The decision of the United States Court of Appeals for the Ninth Circuit is officially reported at 453 F. 2d 1252, and is set out at App. 32a-34a. The order of the Court of Appeals denying petition for rehearing and rejecting suggestion for rehearing in banc is set forth at App. 35a.

## Jurisdiction

The judgment of affirmance of the Court of Appeals was entered on January 19, 1972. A timely filed petition for rehearing in banc was denied on February 18, 1972. The petition for writ of certiorari was filed on May 2, 1972, and was granted on October 10, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The District Court had jurisdiction under 28 U.S.C. §2241(c)(3).

## Question Presented for Review

Whether or not a person released on his own recognizance following trial, conviction and sentence on a state criminal charge is within the purview of 28 U.S.C. §2241(c)(3), which extends the remedy of habeas corpus to persons "in custody" in violation of the Constitution of the United States.

## Constitutional and Statutory Provisions Involved

The Fourteenth Amendment provides, in pertinent part:

"... nor shall any state deprive any person of life, liberty, or property, without due process of law, ..."

28 U.S.C. §2241:

"Power to grant writ:

* * *

(c) The writ of habeas corpus shall not extend to a prisoner unless—

(3) He is in custody in violation of the Constitution ... of the United States;"

28 U.S.C. §2254:

"State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution . . . of the United States."

California Penal Code §§1318-1319.6 (West, 1968), provide as follows:

§1318.4

To be released on his own recognizance the defendant shall file with the clerk of the court in which the magistrate or judge is presiding an agreement in writing duly executed by him, in which he agrees that:

(a) He will appear at all times and places as ordered by the court or magistrate releasing him and as ordered by any court in which, or any magistrate before whom, the charge is subsequently pending.

(b) If he fails to appear and is apprehended outside of the State of California, he waives extradition.

(c) Any court or magistrate of competent jurisdiction may revoke the order of release and either return him to custody or require that he give bail or other assurance of his appearance as elsewhere provided in this chapter.

§1318.6

After a defendant has been released pursuant to this article, the court in which the charge is pending may, in

its discretion, require that the defendant either give bail in an amount specified by it or other security as elsewhere provided in this chapter. The court may order that the defendant be committed to actual custody unless he gives such bail or gives such other security.

§1318.8

The court to which the committing magistrate returns the depositions, or in which an indictment, information or appeal is pending, or to which a judgment on appeal is remitted to be carried into effect, may, by an order entered upon its minutes, direct the arrest of any defendant who has been released upon his own recognizance and his commitment to the officer to whose custody he was committed at the time of such release, and his detention until legally discharged, in the following cases:

(a) When he has failed to appear as agreed.

(b) When he was required to give bail or other security as provided in Section 1318.6 and has failed to do so.

(c) Upon an indictment being found or information filed in cases provided in Section 985.

§1319.6

Every person who is charged with the commission of a misdemeanor who is released on his own recognizance pursuant to this article who wilfully fails to appear as he has agreed, is guilty of a misdemeanor.

## Statement

Petitioner, Kirby J. Hensley, convicted of a misdemeanor in the state court,[1] and presently enlarged on his own recognizance,[2] filed a petition for writ of habeas corpus in the United States District Court for the Northern District of California, challenging the constitutionality of the state conviction.[3]

The District Court did not reach any substantive issues, but denied the petition on the ground that petitioner, being enlarged on his own recognizance, was not "in custody" for purposes of 28 U.S.C. §2241(c)(3).

The Court of Appeals affirmed, relying upon its previous dictum, in *Matysek* v. *United States*, 339 F.2d 389 (9th Cir. 1964), to the effect that a person released on bail was not

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[1] Hensley was sentenced to one year in jail plus $625 fine and penalty assessment for violation of California Education Code §29007, which prohibits the award of Doctor of Divinity degrees without requisite accreditation.

[2] Hensley has been enlarged on recognizance at all times since his conviction. Initially, the state court stayed execution of sentence. At the exhaustion of Hensley's state remedies, the district court issued a stay of execution pending habeas proceedings therein. After the petition was denied, the Circuit Justice granted a stay pending appeal to the Court of Appeals. Following the affirmance of the denial of habeas corpus, the Court of Appeals granted a 30-day stay of its mandate pending application for certiorari. This stay was subsequently extended by the Circuit Justice pending the Court's action on a timely filed petition for a writ of certiorari, to remain in effect pending the judgment of this Court.

[3] The grounds for this Constitutional challenge are, briefly, as follows: 1) denial of free exercise of religion, by the imposition of punishment for essentially religious activity in awarding honorary Doctor of Divinity certificates to individuals who complete a course of religious instruction, and 2) denial of due process of law and effective assistance of counsel, by the failure of trial counsel to appear and present any defense of fact or law that was available to petitioner when the trial court re-opened the case after having initially stayed the proceedings to determine if it had jurisdiction, and by the imposition of judgment of conviction in absentia.

"in custody", actual or constructive, so as to satisfy 28 U.S.C. §2241. The Court of Appeals specifically noted, however, that "the decisional rule is different in several other circuits" and that "the Supreme Court has not, to this date, considered the express question posed herein."

On October 10, 1972, this Court granted Hensley's petition for writ of certiorari.

## ARGUMENT

### State Prisoners Released On Bail Or Recognizance Pending Appeal Are "In Custody" for Purposes of the Federal Habeas Corpus Statute.

#### A. The Restraints Imposed Upon a Person Sentenced To Imprisonment, Who Is Released On Bail Or Recognizance Pending Appeal, Fits the Term "In Custody" in the Federal Habeas Corpus Statute.

In California, as in most States, a person sentenced to imprisonment, who is released on bail or recognizance pending appeal, is subject to a number of restraints, which significantly differentiate his status from that of a free person. The defendant is obligated to appear in court at all times required, and in default thereof, waives extradition. The order of release may be revoked at any time, and the defendant can be rearrested. Failure to appear constitutes a separate offense.[4] In some jurisdictions, territorial and supervisory restrictions are also imposed. Cf. 18 U.S.C. §3146. "When a prisoner is out on bond he is still under court control, though the bounds of his confinement are enlarged. His bondsmen are his jailers." *Carlson* v. *Landon*, 342 U.S. 524, 547 (1952).

In addition, "the fact that petitioner was forced to seek a federal stay order to fend off state incarceration is itself

[4] Cal. Pen. Code §§1318.4, 1318.6, 1318.8, 1319.6, *infra*, at 3-4.

a significant restraint 'not shared by the public generally'." *Choung* v. *People of State of California*, 320 F. Supp. 625, 628 (E.D. Cal. 1970), rev'd, 456 F.2d 176 (9th Cir. 1972), pet. for cert. filed, 71-1562, 40 U.S. L. Week 3577, 41 U.S. L. Week 3028 (May 30, 1972).

This court has definitively set to rest the notion of federal habeas corpus as "a static, narrow formalistic remedy; its scope has grown to achieve its grand purpose—the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty." *Jones* v. *Cunningham*, 371 U.S. 236, 243 (1963) (person on parole is "in custody" for federal habeas corpus purposes).

Subsequent Supreme Court decisions have given an appropriate interpretation to the scope of the "Great Writ." [5]

Of particular relevance hereto, *Peyton* v. *Rowe*, 391 U.S. 54 (1968), applied the federal habeas corpus remedy to

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[5] *Walker* v. *Wainwright*, 390 U.S. 335 (1968), permitted a prisoner to attack a sentence which he was currently serving even though another valid sentence awaited him.

*Carafas* v. *LaVallee*, 391 U.S. 234 (1968), held that expiration of a petitioner's sentence, before his habeas corpus application was finally adjudicated, did not terminate federal jurisdiction:

> "the statute does not limit the relief that may be granted to discharge of the applicant from physical custody. Its mandate is broad with respect to the relief that may be granted. It provides that [t]he court shall . . . dispose of the matter as law and justice require.' 28 U.S.C. §2243. The 1966 amendments to the habeas corpus statute seem specifically to contemplate the possibility of relief other than immediate release from physical custody. At one point, the new §2244(b) (1964 ed., Supp. II) speaks in terms of 'release from custody or other remedy'."

*Harris* v. *Nelson*, 394 U.S. 286, 291 (1969) emphasized:

> "The scope and flexibility of the writ—its capacity to reach all manner of illegal detention—its ability to cut through barriers of form and procedural mazes—have always been emphasized and jealously guarded by courts and lawmakers. The very nature of the writ demands that it be administered with the initiative and flexibility essential to insure that miscarriages of justice within its reach are surfaced and corrected."

questions of future release, overruling *McNally* v. *Hill*, 293 U.S. 131 (1934):

> "to the extent that the rule of *McNally* postpones plenary consideration of issues by the district courts, it undermines the character of the writ of habeas corpus as the instrument for resolving fact issues not adequately developed in the original proceedings." 391 U.S., at 73
>
> "Rowe and Thacker may establish that the convictions they challenge were obtained in violation of the Constitution. If they do, each day they are incarcerated under those convictions while their cases are in the courts will be time that they might properly have enjoyed as free men." Ibid., at 64.

Most recently, *Strait* v. *Laird*, 406 U.S. 341 (1972), upheld the right of an unattached, inactive, Army reserve officer to bring a habeas corpus proceeding—seeking discharge as a conscientious objector—at the place of his domicile, even though he was under nominal command of the Reserve located in Indiana. Mr. Justice Rehnquist, in dissent, suggested, in part, that custody, for habeas purposes, "does not exist for an unattached reservist who is under virtually no restraints upon where he may live, work, or study, and whose only connection with the Army is a future obligation to enter active duty." 406 U.S., at 350. But, of course, petitioner Hensley hardly is that free, and the decision in *Strait* applies a fortiori.

These relatively recent cases[6] vindicate the conclusion, reached by several lower federal courts,[7] as well as by the

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[6] The older decisions in *Stallings* v. *Splain*, 253 U.S. 339 (1920); *Johnson* v. *Hoy*, 227 U.S. 245 (1913); *Baker* v. *Grice*, 169 U.S. 284 (1898); and *Wales* v. *Whitney*, 114 U.S. 564 (1885), obviously are no longer vital.

[7] See *Marden* v. *Purdy*, 409 F. 2d 784, 785 (5th Cir. 1969); *Cupler* v. *City of Greenville*, 422 F. 2d 299, 301 (5th Cir. 1970);

California Supreme Court,[1] that a person on bail or recognisance is "in custody" sufficient to seek habeas corpus relief. This result is fully consistent with the purposes of the federal habeas corpus statute.

**B. The Purposes of the Federal Habeas Corpus Statute Would Be Frustrated by a Requirement That a Criminal Defendant Who Is Released On Bail Or Recognizance Pending Appeal, Must First Surrender To Imprisonment.**

A requirement that a state criminal defendant, who is released on bail or recognizance pending appeal, must first surrender to imprisonment, before he may file a petition for writ of habeas corpus, would operate effectively to dilute and undermine Fourteenth Amendment rights.

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*Beck* v. *Winters*, 407 F. 2d 125, 126-27 (8th Cir. 1969); *Ouletta* v. *Sarver*, 307 F. Supp. 1099, 1101 n. 1 (E.D. Ark. 1970), aff'd, 428 F. 2d 804 (8th Cir. 1970); *Burris* v. *Ryan*, 397 F. 2d 553, 555 (7th Cir. 1968); *United States ex rel. Smith* v. *Di Bella*, 314 F. Supp. 446, 448 (D. Conn. 1970); *Duncombe* v. *New York*, 267 F. Supp. 103, 109 n. 9 (S.D.N.Y. 1967); *Matzner* v. *Davenport*, 288 F. Supp. 636, 638 n. 1 (D. N.J. 1968), aff'd 410 F. 2d 1376 (3rd Cir. 1969). Contra, *Allen* v. *United States*, 349 F. 2d 362 (1st Cir. 1965); *United States ex rel. Meyer* v. *Weil*, 458 F. 2d 1068 (7th Cir. 1972), pet. for cert. filed, 72-5175 (Aug. 2, 1972); *Moss* v. *State of Maryland*, 272 F. Supp. 371 (D. Md. 1967); *United States ex rel. Granello* v. *Krueger*, 306 F. Supp. 1046 (S.D.N.Y. 1969).

[1] In the case of *In Re Smiley*, 66 Cal. 2d 606, 613, 58 Cal. Rptr. 579, 583, 427 P. 2d 179, 183 (1967), the California Supreme Court stated:

> "It cannot be argued that release on recognizance lacks meaningful sanctions. The statute requires the defendant to file an agreement in writing promising to appear at all times and places ordered and waiving extradition if he fails to do so outside California (Pen. Code, §1318.4), and makes wilful failure to appear punishable as an independent crime (Pen. Code §1319.4, 1319.6). Such an individual is not free to go where he will, but is subject to restraints not shared by the public generally. (*Jones* v. *Cunningham*, 371 U.S. at p. 240, 83 S. Ct. at p. 376, 9 L. Ed. 2d 285.) He is therefore under sufficient constructive custody to permit him to invoke the writ."

Where, as here, substantial constitutional questions arising under the First and Fourteenth Amendments are presented, each day the person is incarcerated constitutes an irreparable injury. For that reason, this Court, in *Peyton* v. *Rowe*, 391 U.S. 54 (1968), recognized the propriety of permitting habeas corpus to be brought in anticipation of service of the challenged conviction.

> "Common sense dictates that prisoners seeking habeas corpus relief after exhausting state remedies should be able to do so at the earliest practicable time." Ibid. 391 U.S. at 64

While it may be theoretically possible for a defendant to surrender to imprisonment and then quickly file a petition for writ of habeas corpus and an application for a stay or bail pending hearing therein, *In Re Shuttlesworth*, 369 U.S. 35 (1962), such matters entail discretion and delay, and create an avoidable emergency imposition upon a District Judge's time. A lower court asked to act in haste, may understandably decline to grant a stay initially, at least until the substantiality of the constitutional questions presented is clearly demonstrated. By that time, however, the sentence may already be served if it is short.

Under *Younger* v. *Harris*, 401 U.S. 37 (1971), a person charged with violating an unconstitutional state law[9] would not be able to obtain an injunction to forestall state court prosecution, absent a showing of "bad faith" enforcement. After conviction, the defendant might decide, for a variety of reasons, not to seek review in the Supreme Court after exhausting his state court remedies, or if he did file a petition for writ of certiorari, this court might decline to review. At that point, the defendant could look only toward the United States District Court, in habeas corpus, for

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[9] See, e.g., *Shuttlesworth* v. *Birmingham*, 394 U.S. 147 (1969); *Papachristou* v. *City of Jacksonville*, 405 U.S. 156 (1972).

appropriate relief. If he had to surrender to imprisonment first, only under the most extraordinary circumstances would he be able to be spared the ordeal of being incarcerated for at least some time, in an often decrepit penal institution.[19]

This Court's sensitivity to the significance of penal incarceration, e.g., *Williams* v. *Illinois*, 399 U.S. 235 (1970); *Tate* v. *Short*, 401 U.S. 395 (1971); *Argersinger* v. *Hamlin*, 407 U.S. 25 (1972); *Peyton* v. *Rowe*, 391 U.S. 54 (1968), points up the appropriateness of permitting a defendant on bail or recognizance to seek federal habeas corpus relief, provided that he has exhausted available state court remedies. Requiring the defendant first to surrender might involve physical and psychological dangers, delay in protecting constitutional rights, and unnecessary burdens upon the District Courts, all without any corresponding benefit to the administration of justice.

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[19] For a description of local jails, see, *Jones* v. *Wittenberg*, 323 F. Supp. 93 (N.D. Ohio 1971), aff'd sub nom. *Jones* v. *Metzger*, 456 F.2d 854 (6th Cir. 1972); *Hamilton* v. *Love*, 328 F. Supp. 1182 (E.D. Ark. 1971); Mattick & Aikman, *The Cloacal Region of American Corrections*, 381 Annals of Amer. Acad. Pol. & Soc. 109 (1969); 1970 National Jail Census (L.E.A.A.); McGee, *The Administration of Justice: The Correctional Process*, 5 NPPAJ 225 (1959) (describing the typical county jail as "the lowest form of social institution on the American scene.") Prisoners are frequently subjected, from the instant that they enter the jail, to unsanitary conditions, inadequate shelter, lack of proper food, heat, light, and recreational opportunities, assaults by fellow prisoners, and other degrading and dehumanizing circumstances; thus, incarceration for even the shortest period of time can involve serious physical, not to mention psychological, dangers. See, e.g., *Wayne County Jail Inmates* v. *Wayne County Board of Commissioners*, No. 173-217 (Cir. Ct. Wayne Cty. Mich. May 18, 1971) (3-judge court) (reprinted at p. 119 of Hearings Before Subcommittee No. 3, Committee on the Judiciary, House of Representatives, 92nd Congress, 2d Session, ON CORRECTIONS, Part VIII (March 31, 1972).) Interestingly, a federal court in the very district in which petitioner Hensley would be forced to surrender, has condemned the local jail for its barbaric conditions. *Brenneman* v. *Madigan*, 343 F. Supp. 128 (N.D. Cal. 1972).

## CONCLUSION

The plain meaning of the statutory term "in custody" covers the situation of a person released on bail or recognizance, and the purposes of federal habeas corpus, in safeguarding federal constitutional rights, are served by that interpretation. In the face of this, anachronistic conceptual notions ought not prevail. The judgment of the court below should, therefore, be reversed and the case remanded for further proceedings.

Respectfully submitted,

November, 1972

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## Subject Index



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MUNICIPAL COURT, SAN JOSE-MILPITAS JUDICIAL DISTRICT, SANTA CLARA COUNTY, STATE OF CALIFORNIA,
*Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

## BRIEF FOR RESPONDENT

### OPINIONS BELOW

The decision of the United States District Court for the Northern District of California denying petition for writ of habeas corpus is unreported, and is set out at App. 29a. The District Court's order denying reconsideration, but granting a certificate of probable cause, is unreported and is set forth at App. 30a.

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1252 (9th Cir. 1972) and is set out at App. 32a-34a. The order of the Court of Appeals denying petition for rehearing and rejecting suggestion for rehearing in banc is set forth at App. 35a.

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## JURISDICTION

The judgment of affirmance of the Court of Appeals was entered on January 19, 1972. A timely filed petition for rehearing in banc was denied on February 18, 1972. The petition for writ of certiorari was filed on May 2, 1972, and was granted on October 10, 1972. The jurisdiction of this Court was invoked under 28 U.S.C. §1254(1).

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## QUESTION PRESENTED FOR REVIEW

Whether or not a person released on his own recognizance following trial, conviction and sentence on a state criminal charge is within the purview of 28 U.S.C. §2241(c)(3), which extends the remedy of habeas corpus to persons "in custody" in violation of the Constitution of the United States.

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## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Article I, Section 9:

". . .

"The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."

28 U.S.C. §2241:

"Power to grant writ:

* * *

(c) The writ of habeas corpus shall not extend to a prisoner unless——

(3) He is in custody in violation of the Constitution . . . of the United States;"

Cal. Penal Code §§1318-1318.8 (West, 1968), provide as follows:

§1318

"Upon good cause being shown, any court or magistrate who could release a defendant from custody upon his giving bail, may release such defendant on his own recognizance if it appears to such court or magistrate that such defendant will surrender himself to custody as agreed by following the provisions of this article."

§1318.4

To be released on his own recognizance the defendant shall file with the clerk of the court in which the magistrate or judge is presiding an agreement in writing duly executed by him, in which he agrees that:

(a) He will appear at all times and places as ordered by the court or magistrate releasing him and as ordered by any court in which, or any magistrate before whom, the charge is subsequently pending.

(b) If he fails to appear and is apprehended outside of the State of California, he waives extradition.

(c) Any court or magistrate of competent jurisdiction may revoke the order of release and either return him to custody or require that he give bail or other assurance of his appearance as elsewhere provided in this chapter.

§1318.6

After a defendant has been released pursuant to this article, the court in which the charge is pending may, in its discretion, require that the defendant either give bail in an amount specified by it or other security as elsewhere provided in this chapter. The court may order that the defendant be committed to actual custody unless he gives such bail or gives such other security.

§1318.8

The court to which the committing magistrate returns the depositions, or in which an indictment, information or appeal is pending, or to which a judgment on appeal is remitted to be carried into effect, may, by an order entered upon its minutes, direct the arrest of any defendant who has been released upon his own recognizance and his commitment to the officer to whose custody he was committed at the time of such release, and his detention until legally discharged, in the following cases:

(a) When he failed to appear as agreed.

(b) When he was required to give bail or other security as provided in Section 1318.6 and has failed to do so.

(c) Upon an indictment being found or information filed in cases provided in Section 985.

## STATEMENT OF CASE

Petitioner Kirby J. Hensley was convicted of a misdemeanor on June 25, 1969. Thereafter on July 1, 1969, Hensley was sentenced to one year in jail plus $625 fine for violation of Section 29007 of the California Education Code. Since that time, Petitioner has been out of custody on his own recognizance.[1]

The District Court did not reach the substantive issues raised in the petition for writ of habeas corpus, but denied the petition on the basis that the court lacked jurisdiction over the matter citing the controlling decision of *Matysek v. United States,* 339 F.2d 389 (9th Cir. 1964), holding that the custody requirement of 28 U.S.C. §2241(c) (3) is not met by one at liberty on his own recognizance.

On October 10, 1972, this court granted Hensley's petition for writ of certiorari.

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[1]Hensley has been at large on his own recognizance at all times since his conviction. Initially, the state court stayed execution of sentence. At the exhaustion of Hensley's state remedies, the district court issued a stay of execution pending habeas proceedings therein. After the petition was denied, the Circuit Justice granted a stay pending appeal to the Court of Appeals. Following the affirmance of the denial of habeas corpus, the Court of Appeals granted a 30-day stay of its mandate pending application for certiorari. This stay was subsequently extended by the Circuit Justice pending the Court's action on a timely filed petition for a writ of certiorari, to remain in effect pending the judgment of this Court.

## ARGUMENT

### A Defendant Convicted Of A State Offense Who Is At Liberty On His Own Recognizance When His Federal Habeas Petition Is Filed Is Not "In Custody" For Purposes Of The Federal Habeas Corpus Statute.

Since our country's birth, Congress has provided legislation to permit individuals in custody to petition for habeas corpus.[2] The extent of the habeas jurisdiction has changed throughout the years.[3] In 1948, the present 28 U.S.C. §2241 came into being. A consistent and necessary requirement of all the federal habeas corpus *(ad subjiciendum)* statutes was that jurisdiction could not extend to a person unless he was in actual, physical custody.

This court has recognized that some form of custody is necessary:

> "The federal habeas corpus statute requires that the applicant must be 'in custody' when the application for habeas corpus is filed." *Carafas v. La Vallee,* 391 U.S. 234, 238 (1967).
>
> "Of course, custody in the sense of restraint of liberty is a pre-requisite to habeas, for the only remedy that can be granted in habeas is some form of discharge from custody." *Fay v. Noia,* 372 U.S. 391, 427 fn. 38 (1963).

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[2] "[E]ither of the justices of the Supreme Court as well as judges of the district court which have power to grant writs of habeas corpus for the purpose of an inquiry into the cause of commitment—provided that writs of habeas corpus shall in no case extend to prisoners in gaol, unless where they are in custody under or by color of the authority of the United States. . . ." Section 14 of the Federal Judiciary Act of September 24, 1789 (1 Stat. 78, 81-82)

[3] Act of 1833, 4 Stat. 634-635; Act of 1867, 14 Stat. 385; Act of 1874, 1874 revised Stats., Section 751-753; Act of 1925, 43 Stat. 940.

Custody was not defined in specific terms by Congress, nor has this court specifically defined custody. In *Jones v. Cunningham*, 371 U.S. 236, 238 (1963) this court stated:

> "The habeas corpus jurisdictional statute implements the constitutional command that the writ of habeas corpus be made available. While limiting its availability to those 'in custody', the statute does not attempt to mark the boundaries of 'custody' nor in any way other than by the use of that word attempt to limit the situations in which the writ can be used. To determine whether habeas corpus could be used to test the legality of a given restraint on liberty, this Court has generally looked to common-law usages and the history of habeas corpus both in England and in this country."

While the Constitution in Article I, Section 9, provides the minimum criteria for the grant of federal habeas corpus, Congress has enlarged upon that minimal grant to permit the federal courts to entertain a broader range of applicants for federal habeas. However, the jurisdiction of the federal courts is nonetheless not absolute; its power is restricted by the limitations imposed upon it by Congress.[4] The extent of the constitutionally provided federal habeas as envisioned by the framers of the constitution was

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[4] "At the time the privilege of the writ was written into the Federal Constitution it was settled that the writ lay to test any restraint contrary to fundamental law, which in England stemmed ultimately from Magna Charta but in this country was embodied in the written Constitution. Congress in 1867 sought to provide a federal forum for state prisoners having constitutional defenses by extending the habeas corpus powers of the federal courts to their constitutional maximum." *Fay v. Noia*, 372 U.S. at 426.

to free a person accused of the crime from actual physical custody in jail *on bail*, not to free him *from bail*. *See McNally v. Hill*, 293 U.S. 131, 137-138 (1934). *See also Payton v. Roe*, 391 U.S. 54 (1968) (reversed on other ground).

This court has long recognized that an applicant for federal habeas corpus must be in a position to benefit from the writ, *i.e.*, to be released from custody, whether immediately or in the future. Where the applicant is already free either on bail or otherwise, the court is powerless to grant any relief. *Johnson v. Hoy*, 227 U.S. 245, 247, 248 (1913); *Stalling v. Splain*, 253 U.S. 339 (1920).[5]

Mr. Justice Rehnquist in his dissent in *Strait v. Laird*, 406 U.S. 141, 146 (1972), aptly points out that "notions of custody have changed over the years." Those changing notions, however, cannot be such as

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[5] "Of course if there is no prisoner to release, if there is no custody to be discharged, if there is no such restraint as requires relief, then the civil court has no power to interfere with the military court or other tribunal over which it has by law no appellate jurisdiction.

The writ of *habeas corpus* is not a writ of error, though in some cases in which the court issuing it has appellate power over the court by whose order the petitioner is held in custody, it may be used with the writ of *certiorari* for that purpose. In such case, however, as the one before us it is not a writ of error. Its purpose is to enable the court to inquire, first, if the petitioner is restrained of his liberty. If he is not, the court can do nothing but discharge the writ. If there is such restraint, the court can then inquire into the cause of it, and if the alleged cause be unlawful it must then discharge the prisoner." *Wales v. Whitney*, 114 U.S. 564 at 570.

Furthermore, by voluntarily giving bail to appear in Wyoming, the purpose of the removal proceedings have been accomplished and all questions in controversy in the habeas corpus and in the removal proceedings terminated, whether his arrest and detention had originally been valid was, therefore, rendered immaterial. *In re Esselborn*, 8 F. 904.

to depart completely from the reasonable meaning of the term "custody". However, should the court determine that a defendant released on his own recognizance is eligible for federal habeas corpus, that determination would be one not founded on either constitutional or legislative authority, but rather on judicial fiat.

The Petitioner's brief at Page 9 suggests that the conditions imposed on a defendant's release on his own recognizance are of such magnitude that permit the invocation of federal habeas corpus. However, when compared with the restraints on liberty as delineated in *Jones v. Cunningham, supra,* the conditions under which the defendant was released pale into insignificance.[6]

As the first circuit stated in *Allen v. United States,* 349 F. 2d 362 (1st Cir. 1969) wherein a federal prisoner who was out on bail following an appeal was denied habeas corpus by that court on the basis that the only restraint imposed on that defendant was the requirement to subject himself to the court upon reasonable notice, which condition did not restrain the defendant nor constitute custody of him.

Interestingly, Petitioner fails to include *in toto* Section 1318 of the California Penal Code, which section

[6]Petitioner is confined by the parole order to a particular community, house, and job at the sufferance of his parole officer. He cannot drive a car without permission. He must periodically report to his parole officer; permit the officer to visit his home and job at any time; and follow the parole officer's advice. He is admonished to keep good company and good hours; work regularly; keep away from undesirable places; and live a clean, honest, and temperate life. *Jones v. Cunningham,* 371 U.S. at 242.

contains the substantive basis for a release on one's own recognizance. That section reads as follows:

> Upon good cause being shown, any court or magistrate who could release a defendant *from custody* upon his giving bail, may release such defendant on his own recognizance if it appears to such court or magistrate that such defendant will surrender himself *to custody* as agreed by following the provisions of this article. Cal. Penal Code §1318 (West 1968) (emphasis supplied).

By statutory definition, a defendant released on his own recognizance is discharged from custody subject only to the termination of that status by a magistrate for either the failure to appear when ordered or the failure to give bail or other security determined necessary by that court. Until that time, a released person is free to do as he or any other person in our community wishes. He is not required to remain in any particular community, house or job (this Petitioner has in fact traveled widely during the last 3½ years since his conviction). He can drive a vehicle if he wishes, and he need not report to any person.

Were this court to extend habeas jurisdiction pursuant to 28 U.S.C. §2241 to individuals in the position of this Petitioner, the probable increase in the rate of habeas petitions would substantially increase as contrasted with the increase experienced between 1961 and 1971.[7]

[7]See Appendix A attached hereto.

## CONCLUSION

We respectfully submit that the judgment of the United States Court of Appeals should be affirmed.

Dated, San Jose, California,
December 18, 1972.

LOUIS P. BERGNA,
District Attorney, Santa Clara County,
DENNIS ALAN LEMPERT,
Deputy District Attorney, Santa Clara County,
*Attorneys for Respondent.*

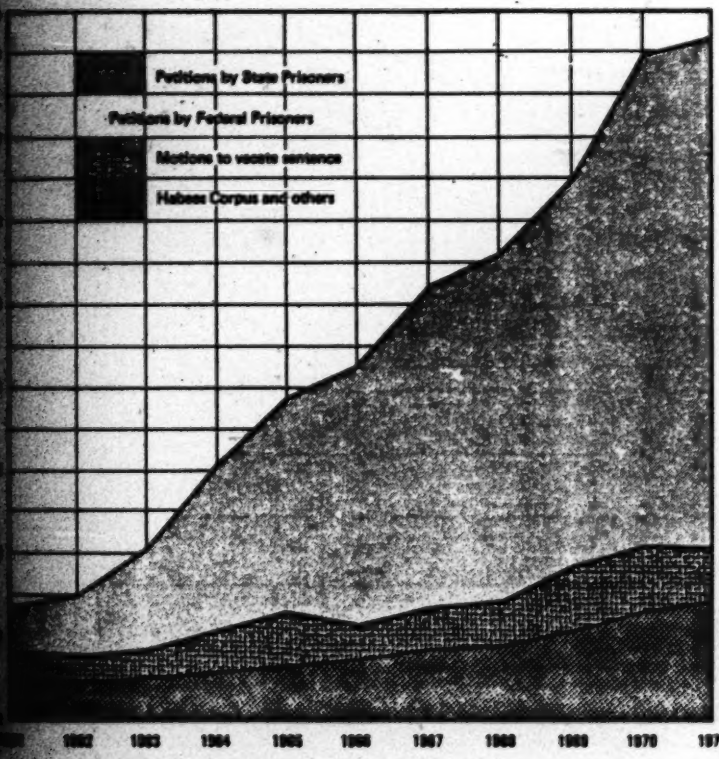
**(Appendix A Follows)**

Appendix A

STATES DISTRICT COURTS

# PETITIONS FILED BY STATE AND FEDERAL PRISONERS

FISCAL YEARS 1961–1971




Administrative Office of the United States Courts

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U. S. 321, 337.

# SUPREME COURT OF THE UNITED STATES

Syllabus

## HENSLEY *v.* MUNICIPAL COURT, SAN JOSE-MILPITAS JUDICIAL DISTRICT, SANTA CLARA COUNTY, CALIFORNIA

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 71-1428. Argued January 15, 1973—Decided April 18, 1973

Restraints imposed on petitioner who was released on his own recognizance constitute "custody" within the meaning of the federal habeas corpus statute, 28 U. S. C. §§ 2241 (c)(3), 2254 (a). Pp. 4-9.

453 F. 2d 1252, reversed and remanded.

BRENNAN, J., delivered the opinion of the Court, in which DOUGLAS, STEWART, WHITE, and MARSHALL, JJ., joined. BLACKMUN, J., filed an opinion concurring in the result. REHNQUIST, J., filed a dissenting opinion, in which BURGER, C. J., and POWELL, J., joined.

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Lumber Co., 200 U. S. 321, 337.

# SUPREME COURT OF THE UNITED STATES

Syllabus

## BENSLEY v. MUNICIPAL COURT, SAN JOSE-MILPITAS JUDICIAL DISTRICT, SANTA CLARA COUNTY, CALIFORNIA

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 71-1626. Argued January 15, 1973—Decided April 18, 1973

Bensley, indicted on perjury, who was released on his own recognizance pending "custody" within the meaning of the federal habeas corpus statute, 28 U. S. C. §§ 2241 (c)(3), 2254 (a). Pp. 4–9.

(9th Cir., 24 [illegible], reversed and remanded.

Douglas, J., delivered the opinion of the Court, in which Brennan, White and Marshall, JJ., joined. Blackmun, J., filed an opinion concurring in the result. Burger, C. J., filed a dissenting opinion, in which Stewart, C. J., and Powell, J., joined.

# SUPREME COURT OF THE UNITED STATES

No. 71-1428

Kirby J. Hensley, Petitioner,
*v.*
Municipal Court, San Jose Milpitas Judicial District, Santa Clara County, State of California.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[April 18, 1973]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

This case requires us to determine whether a person released on his own recognizance is "in custody" within the meaning of the federal habeas corpus statute. 28 U. S. C. §§ 2241 (c)(3), 2254 (a). See *Peyton* v. *Rowe*, 391 U. S. 54 (1968); *Carafas* v. *LaVallee*, 391 U. S. 234 (1968); *Jones* v. *Cunningham*, 371 U. S. 236 (1963). Petitioner initiated this action in the United States District Court for the Northern District of California, challenging a state court conviction on First and Fourteenth Amendment grounds. The court denied relief, holding that since the petitioner was enlarged on his own recognizance pending execution of sentence, he was not yet "in custody" for purposes of the habeas corpus statute. The Court of Appeals for the Ninth Circuit agreed that release on one's own recognizance is not sufficient custody to confer jurisdiction on the District Court, and affirmed

the judgment, 455 F. 2d 1252 (1972).[1] We granted certiorari, 409 U. S. 840 (1972), and we reverse.

Convicted of a misdemeanor in California Superior Court for violation of § 29007 of the California Education Code,[2] petitioner was sentenced to serve one year in jail and pay a fine of $625. He appealed his conviction unsuccessfully to the Appellate Department of the Superior Court, and his efforts to have the conviction set aside on state court collateral attack have proved equally unavailing. It appears that petitioner exhausted all available state court remedies prior to filing this petition for federal habeas corpus. See 28 U. S. C. § 2254 (b).[3]

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[1] The Court of Appeals concluded that the question was controlled by a prior decision of the same court, *Matyask* v. *United States*, 339 F. 2d 389 (CA9 1964).

[2] Petitioner was convicted of awarding Doctor of Divinity Degrees without obtaining the necessary accreditation. He defended the charge on the grounds that he is the chief presiding officer of a bona fide church, that his church has awarded honorary Doctor of Divinity certificates to persons who have completed a course of instruction in the church's principles, and that state interference with this practice is an unconstitutional restraint on the free exercise of his religious beliefs.

[3] There is a substantial question whether petitioner has forfeited the right to raise his First and Fourteenth Amendment challenge to the state court conviction by deliberately bypassing an opportunity to raise the claim in the state courts. See *Fay* v. *Noia*, 372 U. S. 391 (1963). Respondent maintains that petitioner deliberately absented himself from trial following the close of the prosecution's case, with full knowledge that the trial would continue in his absence. He thereby relinquished, the State contends, the right to defend himself and present evidence on his behalf. Petitioner argues in response that trial counsel failed to advise him of the reopening of trial and failed to warn him that absence from trial would lead to conviction. Accordingly, he asserts that he should not be held to have knowingly and intelligently bypassed an available state procedure. The record on this point is more than a little obscure, and we express no opinion on the question beyond noting that the issue

At all times since his conviction petitioner has been enlarged on his own recognizance. While pursuing his state court remedies he remained at large under an order of the state trial court staying execution of his sentence. And the state trial court extended its stay, even after the Supreme Court of California declined to hear his application for postconviction relief, apparently to permit petitioner to remain at large while seeking habeas corpus in the United States District Court. Pending appeal from the District Court's denial of relief, an application for extension of the state court stay was granted by Mr. Justice Black, as Acting Circuit Justice, on August 12, 1970, and extended by MR. JUSTICE DOUGLAS, as Circuit Justice, on August 20, 1970, and again on September 9, 1970.[4] The Court of Appeals affirmed the denial of habeas corpus, but granted a 30-day stay of its mandate pending application for certiorari. That stay was extended by MR. JUSTICE DOUGLAS, as Circuit Justice, on March 20, 1972, and it is pursuant to his order that petitioner remains at large at the present time.

The California Penal Code provides that any court that may release a defendant upon his giving bail may release him on his own recognizance, provided he agrees in writing that

> "(a) He will appear at all times and places as ordered by the court or magistrate releasing him and as ordered by any court in which, or any magistrate before whom, the charge is subsequently pending.

was not considered, much less resolved, by either of the courts below, and it is not in any sense presented for our decision.

[4] In his Motion for Stay, filed in this Court on August 11, 1970, and addressed to the Circuit Justice of the Ninth Circuit, petitioner explained that the "Stay of Execution granted by the Trial Court is scheduled to expire on August 12, 1970, at which time petitioner has been ordered to surrender himself to the Sheriff of Santa Clara County for immediate incarceration." Motion for Stay, at 2.

"(b) If he fails to so appear and is apprehended outside of the State of California, he waives extradition.

"(c) Any court or magistrate of competent jurisdiction may revoke the order of release and either return him to custody or require that he give bail or other assurance of his appearance . . . ." Cal. Penal Code § 1318.4.

A defendant is subject to re-arrest if he fails to appear as agreed, *id.*, § 1318.9 (a), and a willful failure to appear is itself a criminal offense. *Id.*, § 1319.6. We assume that these statutory conditions have been imposed on petitioner at all times since the state trial court stayed execution of his sentence.

The question presented for our decision is a narrow one: namely, whether the conditions imposed on petitioner as the price of his release constitute "custody" as that term is used in the habeas corpus statute. Respondent contends that the conditions imposed on petitioner are significantly less restrictive than those imposed on the petitioner in *Jones* v. *Cunningham*, 371 U. S. 236 (1963), where we held that a person released on parole is "in custody" for purposes of the district courts' habeas corpus jurisdiction. It is true, of course, that the parolee is generally subject to greater restrictions on his liberty of movement than a person released on bail or his own recognizance. And some lower courts have reasoned that this difference precludes an extension of the writ in cases such as the one before us.[1] On the other hand, a substantial number of courts, perhaps a majority, have concluded that a person released on bail or on his own

[1] See, e. g., *United States ex rel. Meyer* v. *Wolf*, 458 F. 2d 1068 (CA7 1972); *Allen* v. *United States*, 349 F. 2d 302 (CA1 1965); *Application of Jackson*, 338 F. Supp. 1225 (WD Tenn. 1971); *United States ex rel. Granello* v. *Krueger*, 306 F. Supp. 1046 (EDNY 1969); *Moss* v. *Maryland*, 272 F. Supp. 371 (Md. 1967).

recognizance may be "in custody" within the meaning of the statute.[6] In view of the analysis which led to a finding of custody in *Jones* v. *Cunningham*, *supra*, we conclude that this latter line of cases reflects the sounder view.

While the "rhetoric celebrating habeas corpus has changed little over the centuries," [7] it is nevertheless true that the functions of the writ have undergone dramatic change. Our recent decisions have reasoned from the premise that habeas corpus is not "a static, narrow, formalistic remedy," *Jones* v. *Cunningham*, *supra*, but one which must retain the "ability to cut through barriers of form and procedural mazes." *Harris* v. *Nelson*, 394 U. S. 286, 291 (1969). See *Frank* v. *Mangum*, 237 U. S. 309, 346 (1915) (Holmes, J., dissenting). "The very nature of the writ demands that it be administered with the initiative and flexibility essential to insure that miscarriages of justice within its reach are surfaced and corrected." *Harris* v. *Nelson*, *supra*, at 291.

Thus, we have consistently rejected interpretations of the habeas corpus statute that would suffocate the writ

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[6] See, e. g., *Cupler* v. *City of Greenville*, 422 F. 2d 299, 301 (CA5 1970); *Marden* v. *Purdy*, 409 F. 2d 784, 785 (CA5 1969); *Beck* v. *Winters*, 407 F. 2d 125, 126–127 (CA8 1969); *Burris* v. *Ryan*, 397 F. 2d 553, 555 (CA7 1968); *United States ex rel. Smith* v. *DiBella*, 314 F. Supp. 446 (Conn. 1970); *Oudetta* v. *Sarrer*, 307 F. Supp. 1099, 1101 n. 1 (ED Ark. 1970), aff'd, 428 F. 2d 804 (CA8 1970); *Cantillon* v. *Superior Court*, 305 F. Supp. 304, 306–307 (CD Calif. 1969); *Matzner* v. *Davenport*, 288 F. Supp. 636, 638 n. 1 (NJ 1968), aff'd, 410 F. 2d 1376 (CA3 1969); *Nash* v. *Purdy*, 283 F. Supp. 827, 838–839 (SD Fla. 1968); *Duncombe* v. *New York*, 267 F. Supp. 103, 109 n. 9 (SDNY 1967); *Foster* v. *Gilbert*, 264 F. Supp. 209, 211–212 (SD Fla. 1967). In addition, the Supreme Court of California has concluded that release on one's own recognisance under the laws of that State imposes "sufficient constructive custody" to permit an application for writ of habeas corpus. *In re Smiley*, 66 Cal. 2d 606, 613, 58 Cal. Rptr. 579, 583, 427 P. 2d 179, 183 (1967).

[7] Note, Developments in the Law—Federal Habeas Corpus, 83 Harv. L. Rev. 1038, 1040 (1970).

in stifling formalisms or hobble its effectiveness with the manacles of arcane and scholastic procedural requirements. The demand for speed, flexibility, and simplicity is clearly evident in our decisions concerning the exhaustion doctrine, *Fay* v. *Noia*, 372 U. S. 391 (1963); *Brown* v. *Allen*, 344 U. S. 443 (1953); the criteria for relitigation of factual questions, *Townsend* v. *Sain*, 372 U. S. 293 (1963); the prematurity doctrine, *Peyton* v. *Rowe*, 391 U. S. 54 (1968); the choice of forum, *Braden* v. *30th Judicial District*, — U. S. — (1973); *Strait* v. *Laird*, 406 U. S. 341 (1972); and the procedural requirements of a habeas corpus hearing, *Harris* v. *Nelson*, *supra*. That same theme has indelibly marked our construction of the statute's custody requirement. See *Strait* v. *Laird*, *supra*; *Peyton* v. *Rowe*, *supra*; *Carafas* v. *LaVallee*, 391 U. S. 234 (1968); *Walker* v. *Wainwright*, 390 U. S. 335 (1968); *Jones* v. *Cunningham*, *supra*.*

The custody requirement of the habeas corpus statute is designed to preserve the writ of habeas corpus as a remedy for severe restraints on individual liberty. Since habeas corpus is an extraordinary remedy whose operation is to a large extent uninhibited by traditional rules of finality and federalism, its use has been limited to cases of special urgency, leaving more conventional remedies for cases in which the restraints on liberty are neither severe nor immediate. Applying that principle, we can only conclude that petitioner is in custody for purposes of the habeas corpus statute. First, he is sub-

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* Insofar as former decisions, *Stallings* v. *Splain*, 253 U. S. 339 (1920); *Johnson* v. *Hoy*, 227 U. S. 245 (1913); *Baker* v. *Grice*, 169 U. S. 284 (1898); *Wales* v. *Whitney*, 114 U. S. 564 (1885), may indicate a narrower reading of the custody requirement, they may no longer be deemed controlling. In none of the decisions on which we today rely, *Strait* v. *Laird*, *supra*; *Peyton* v. *Rowe*, *supra*; *Carafas* v. *LaVallee*, *supra*; *Jones* v. *Cunningham*, *supra*, are these earlier cases even cited in the opinions of the Court.

jest to restraints "not shared by the public generally," *Jones* v. *Cunningham*, *supra*, at 240: that is, the obligation to appear "at all times and places as ordered" by "[a]ny court or magistrate of competent jurisdiction." Cal. Penal Code §§ 1318.4 (a), 1318.4 (c). He cannot come and go as he pleases. His freedom of movement rests in the hands of state judicial officers, who may demand his presence at any time and without a moment's notice. Disobedience is itself a criminal offense. The restraint on his liberty is surely no less severe than the conditions imposed on the unattached reserve officer whom we held to be "in custody" in *Strait* v. *Laird*, *supra*.[*]

Second, petitioner remains at large only by the grace of a stay entered first by the state trial court and then extended by two Justices of this Court. The State has emphatically indicated its determination to put him behind bars, and the State has taken every possible step to secure that result. His incarceration is not, in other words, a speculative possibility that depends on a number of contingencies over which he has no control. This is not a case where the unfolding of events may render the entire controversy academic. The petitioner has been forced to fend off the state authorities by means of a stay, and those authorities retain the determination and the power to seize him as soon as the obstacle of the stay is removed. The need to keep the stay in force is itself an unusual and substantial impairment of his liberty.

Moreover, our conclusion that the petitioner is presently in custody does not interfere with any significant

[*] Similarly, in *Braden* v. *30th Judicial District*, — U. S. — (1973), where the Commonwealth of Kentucky had lodged a detainer against a prisoner in an Alabama jail, we held that the petitioner was in the custody of Kentucky officials for purposes of his habeas corpus action.

interest of the State. Indeed, even if we were to accept the State's argument that petitioner is not in custody, that result would do no more than postpone this habeas corpus action until petitioner had begun service of his sentence.[11] It would still remain open to the District Court to order petitioner's release pending consideration of his habeas corpus claim. *In re Shuttlesworth*, 369 U. S. 35 (1962). Even if petitioner remained in jail only long enough to have his petition filed in the District Court, his release by order of the District Court would not jeopardize his "custody" for purposes of a habeas corpus action. *Carafas* v. *LaVallee*, *supra*.[12] Plainly, we would badly serve the purposes and the history of the writ to hold that under these circumstances the petitioner's failure to spend over 10 minutes in jail is enough to deprive the District Court of power to hear his constitutional claim.

Finally, we emphasize that our decision does not open the doors of the district courts to the habeas corpus petitions of all persons released on bail or on their own recognizance. We are concerned here with a petitioner who has been convicted in state court and who has apparently exhausted all available state court opportunities to have that conviction set aside. Where a state defendant is released on bail or on his own recognizance pending trial or pending appeal, he must still contend with the requirements of the exhaustion doctrine if he seeks habeas corpus relief in the federal courts. Noth-

[11] By contrast, a finding of no "custody" in *Carafas* v. *LaVallee*, *supra*, would not merely have postponed the exercise of habeas corpus jurisdiction, but would have barred it altogether. Similarly, if we had held in *Jones* v. *Cunningham*, *supra*, that a parolee is not in custody, then habeas corpus jurisdiction could not have been exercised until such time as release on parole was revoked. Cf. *Peyton* v. *Rowe*, *supra*.

[12] *The United States ex rel. Fox* v. *Esperdy*, 206 F. Supp. 726 (SDNY 1962); *Goldberg* v. *Hendrick*, 214 F. Supp. 286, 288–289 (ED Pa. 1963).

ing in today's opinion alters the application of that doctrine to such a defendant.

Since the Court of Appeals erroneously concluded that petitioner was not "in custody" at the time his petition was filed, its judgment is reversed and the case is remanded to the District Court to consider his petition for a writ of habeas corpus.

*Reversed and remanded.*

# SUPREME COURT OF THE UNITED STATES

No. 71-1428

| | |
|---|---|
| Kirby J. Hensley, Petitioner, v. Municipal Court, San Jose Milpitas Judicial District, Santa Clara County, State of California. | On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit. |

[April 18, 1973]

MR. JUSTICE BLACKMUN, concurring in the result.

I emphasize again, as I did in my separate concurrence in *Braden* v. *30th Judicial Court of Kentucky*, — U. S. —, — (1973), that the Court has wandered a long way down the road in expanding traditional notions of habeas corpus. Indeed, the Court now concedes this. *Ante*, p. 5. The present case is yet another step. Although recognising that the custody requirement is designed to preserve the writ as a remedy for *severe* restraints on individual liberty, *ante*, p. 6, the Court seems now to equate custody with almost any restraint, however tenuous. One wonders where the end is. Nevertheless, in the light of cases already decided by the Court, I feel compelled to go along and therefore concur in the result.

# SUPREME COURT OF THE UNITED STATES

No. 71-1428

Kirby J. Hensley, Petitioner,
v.
Municipal Court, San Jose Milpitas Judicial District, Santa Clara County, State of California.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[April 18, 1973]

MR. JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE and MR. JUSTICE POWELL join, dissenting.

The issue in this case is whether petitioner was in "custody," within the meaning of 28 U. S. C. § 2241, entitling him to the benefit of the extraordinary writ of habeas corpus. The Court of Appeals for the Ninth Circuit unanimously held that he was neither in actual nor constructive custody. If there is any vestige left of the obvious and the original meaning of "custody" the court below was right and the majority opinion of this Court today has further stretched both the letter and the rationale of the statute.

Petitioner has been free on his own recognizance since his conviction and the imposition of sentence in the summer of 1969. The California statute authorizing his release imposes no territorial or supervisory limitations and he has been subject to none. He has not been required to post any kind of security for his appearance. At the time of the filing of his federal habeas petition, the only conceivable restraint on him was that at the time of the expiration of the stay granted by the state court, petitioner would have had to surrender himself to the custody of the sheriff. The record shows that for the three and one-half years since his conviction, peti-

tioner has utilized his freedom to travel both within and without the State of California for business purposes.

Petitioner was under no greater restriction than one who had been subpoenaed to testify in court as a witness. This is simply not "custody" in any known sense of the word, and it surely is not what was meant by Congress when it enacted 28 U. S. C. § 2241. The Court apparently feels, like Faust, that it has in its previous decisions already made its bargain with the devil, and it does not shy from this final step in the re-writing of the statute. I cannot agree, and I therefore dissent.